95-1109

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

HAROLD D. MURDOCK,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Title III of the Organized Crime Control Act of 1968 bars the use by the government in a federal criminal prosecution of tape recordings of telephone conversations made by a private party, in violation of its provisions, but without the knowledge or participation of the government.

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CITATIONS OF THE DECISIONS BELOW

The decision of the district court is not reported.

The decision of the Sixth Circuit Court of Appeals is reported at 63 F.3d 1391 (6th Cir. 1995)

BASIS OF JURISDICTION IN THIS COURT

The Sixth Circuit Court of Appeals filed its opinion affirming petitioner's conviction on August 23, 1995.

Petitioner's timely filed Motion for Rehearing and Suggestion for Rehearing En Banc was denied by the Sixth Circuit on October 6, 1995.

This Court has jurisdiction to review the decision of the Sixth Circuit on writ of certiorari pursuant to 28 U.S.C. § 1254(1)

STATUTES INVOLVED

18 U.S.C. § 2511(1) provides:

(1) Except as otherwise specifically provided in this chapter any person who –

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when –

(i) such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

(ii) such device transmits communications by radio, or interferes with the transmission of such communication; or

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce; or

(iv) such use or endeavor to use (A) takes place on the premises of any business or other commercial establishment the operations of which affect interstate or, foreign commerce; or (B) obtains or is for the purpose of obtaining information relating to the operations of any business or other commercial establishment the operations of which affect interstate or foreign commerce; or

(v) such person acts in the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or

electronic communication in violation of this subsection; or

(e)(i) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(A)(ii), 2511(b)-(c), 2511(e), 2516, and 2518 of this subchapter, (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, (iii) having obtained or received the information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation, shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2515 provides:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

STATEMENT OF THE CASE

The instant indictment charged, and Petitioner was convicted of, income tax evasion, in violation of 26 U.S.C. § 7201. This is an "offense[ ] against the laws of the United States" within the meaning of 18 U.S.C. § 3231. Accordingly, the United States District Court for the Eastern District of Michigan, the court of first instance, had subject matter jurisdiction over the underlying criminal case.

Petitioner Harold Murdock was President of the Detroit School Board. The case at bar involves a prosecution for his alleged failure to report approximately $90,000 in alleged bribes.

The Government's case rested on a series of tape recordings of telephone conversations which were secretly recorded by Defendant's then-estranged wife. The circumstances surrounding these surreptitious recordings were developed at an evidentiary hearing in the district court on September 24, 1993.

Georgia Murdock, who is now the petitioner's ex-wife, testified that during 1985, she and the Petitioner were separated but operated the Murdock Funeral Home as business partners. Mrs. Murdock lived in a house next to the funeral home, which was formerly the marital home. There were four business telephones (under two business lines) at the funeral home and four telephones (under the same two numbers) in the private residence. These telephones were used for both business and personal calls.

In the spring of 1985, Mrs. Murdock decided that she would attach a recording device to the business telephone extensions in her home in an effort to secure evidence of her husband's suspected infidelities and business improprieties. She purchased a recorder and an instruction manual and set up the equipment on two telephones in her house.

Mrs. Murdock testified that she recorded conversations with this monitoring equipment for approximately three months. During the time she was making the recordings, she did not have any contact with law enforcement agents.

At some point in 1986, after she had discontinued the taping, Mrs. Murdock read a story in a Detroit newspaper regarding a dispute involving the award of a contract to supply milk to the Detroit Public Schools. She recalled an intercepted conversation she had overheard between her husband and an official of the dairy to which the contract had been awarded, and concluded that what she had on tape was her husband agreeing to accept a bribe.

She then made a master tape of conversations that she felt incriminated her husband in a bribery conspiracy, and mailed it anonymously to the dairy which had lost the milk contract. The aggrieved dairy turned the tape over to local authorities and to a newspaper. When the newspaper published an account of the contents of the tape, the federal government began an investigation which resulted in the Petitioner's Indictment in the United States District Court for the Eastern District of Michigan.

Petitioner's motion to dismiss the indictment or suppress the tape-recorded evidence was denied by the district court on the basis that because the tapes were made on extension telephones, and what the trial judge concluded was "in the ordinary course of business," no interception within the meaning of Title III of the Organized Crime Control Act of 1968 took place. Even if the recordings did constitute "interceptions," the district court held, it would not suppress them because the government was not involved in their making, and "no deterrent effect is served by punishing the government for the alleged wrongdoings of Mrs. Murdock." (App. 51)

Petitioner entered an *Alford* plea of guilty (*North Carolina v. Alford*, 400 U.S. 25 (1970)), under a plea agreement in which, pursuant to Rule 11(a)(2), F.R.Cr.P., he reserved his right to appeal the denial of his motion to dismiss or suppress. He was sentenced to serve a year and a day in prison, but remains free on bond pending appeal.

The Sixth Circuit Court of Appeals held that Mrs. Murdock's actions did indeed constitute an interception subject to the constraints of Title III, and the tapes were accordingly unlawfully made, but declined to apply Title III's exclusionary rule.

That rule, set forth in 18 U.S.C. § 2515, is absolute on its face, as the Sixth Circuit recognized. It provides, in pertinent part that when "any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom" can be used in any proceeding "if the disclosure of that information would be in violation of" Title III.

Since the court held that the interception had in fact been in violation of the statute, disclosure of the contents of the interception would likewise be a violation, under the provisions of 18 U.S.C. § 2511(1)(c), which forbids the intentional disclosure of "the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of" Title III.

Since the preconditions set out by § 2515 were clearly met in this circumstance – the tapes were made in violation of Title III, and their disclosure would therefore likewise be in violation of Title III – the plain language of the statute would seem to require exclusion. Indeed, that was precisely the conclusion reached by the First Circuit Court of Appeals in *United States v. Vest*, 813 F.2d 477 (1st Cir. 1987) , but the Sixth Circuit refused to follow *Vest*. Instead, the court fashioned what it referred to as a "clean hands" exception to the statute's blanket rule of exclusion: since the government played no part in the unlawful interception, the exclusion of the evidence that the language of the statute commands would have no deterrent effect, and the exclusionary rule of the statute would not be enforced. The court held:

> Under the circumstances of this case, we find that any privacy interest which the defendant may have had is protected solely by his right to bring a civil action against his former wife. However, he does not enjoy the additional right to the suppression of the interceptions where, as

here, the government took no part in the interceptions.

63 F.3d at 1403.

REASONS FOR GRANTING THE WRIT

The issue involved in the case at bar is perhaps not "important" in the sense of generating a flood of litigation, but it is certainly "important" in a more basic sense: because it concerns the interplay of the most important of public and private rights, obligations, and interests. It arises at that crucial area where public and private actions intersect to affect the most basic of individual liberties: the right of personal privacy.

As noted above, the decision of the Sixth Circuit in this case specifically rejects, and is directly contrary to, that of the First Circuit in *United States v. Vest*, 813 F.2d 477 (1st Cir. 1987). If for no other reason, the grant of certiorari would be appropriate in this case to resolve this direct conflict between the circuits concerning this important matter of Federal law.

However, this Court should be moved to act in this case not simply because the issue would be resolved differently in Boston than it would be in Cincinnati, or because the First Circuit was right, and the Sixth wrong – although that is surely so. Rather, certiorari should be granted because the decision below is so deeply flawed, and so badly in conflict with basic principles of law announced by this Court in a host of bedrock decisions – and with the clear language of the statute involved. Under the circumstances, this Court's voice should be

heard, to vindicate both the integrity of its own pronouncements, and the statute's clear expression of the will of Congress.

To summarize, the Sixth Circuit opinion:

- Disregards the express language of 18 U.S.C. § 2515, and, in the worst sort of judicial legislation, presumes to carve out, without necessity or justification, a "clean hands" exception to the statute, in the face of Congress's explicit and unqualified intention to exclude unlawfully intercepted from proceedings before United States District Courts;

- Disregards this Court's studied explanations, in cases such as *Gelbard v. United States*, 408 U.S. 41 (1972) and *United States v. Giordano*, 416 U.S. 505 (1974), of the scope, reach, and thrust of Title III; and

- Misconstrues, and misapplies, the principles developed in the area of "private searches" in such cases as *Walter v. United States*, 447 U.S. 649 (1980) and *United States v. Jacobsen*, 466 U.S. 109 (1984), decided under the Fourth Amendment, a provision aimed solely at governmental action, to a situation which is wholly and solely governed by a statute which, by its very terms, is meant to limit both governmental and private actions.

The starting point for the Sixth Circuit's treatment of the exclusion issue, and an appropriate starting point for this analysis, was its rejection of the First Circuit's decision in *United States v. Vest, supra.*

In *Vest*, one Waters had turned over to the government a tape recording he had surreptitiously (and in violation of Title III) made of a conversation with the defendant. When confronted with the recording in the course of a grand jury appearance, Vest denied the voice was his, and he was indicted for perjury. Vest moved to suppress the tape, the district court agreed, and the government appealed.

The First Circuit recognized that the unequivocal language of § 2515 might produce anomalous results if applied in every conceivable situation: "A literal reading might, for example, forbid the use in evidence of an illegal recording in a prosecution brought under section 2511(1)(a) against the maker of that illegal recording." 813 F.2d at 480. In such instances, ordinary rules of statutory construction, of course, allow for judicially crafted exceptions to avoid results which would clearly be at odds with the congressional purpose. See, *e.g.*, *United States v. American Trucking Associations*, 310 U.S. 534, 544 (1940). This narrow exception to the rule of obedience to the plain language of a statute does not, however, compel – or even permit – a "clean hands" exception to § 2515, as the *Vest* court explained in a passage that was noted, though rejected, by the court below:

> The district court accepted the government's argument that an inquiry into the purpose of section 2515 is necessary in order properly to interpret that section's exclusionary rule. But the district court concluded, and we agree, that the government's characterization of section 2515 as solely aimed at deterring Title III violations is too narrow. In *Gelbard v. United States*, 408 U.S. 41, 47-52, 92 S.Ct. 2357, 2360-63,

> 33 L.Ed.2d 179 (1972), the Supreme Court exhaustively reviewed the legislative history of Title III and concluded that "the protection of privacy was an overriding congressional concern" when it enacted Title III, id. at 48, 92 S.Ct. at 2361, and that section 2515's "importance as a protection for 'the victim of an unlawful invasion of privacy' could not be more clear." *Id.* at 50, 92 S.Ct. at 2362. As the Court recognized in *Gelbard, id.* at 51-52, 92 S.Ct. at 2362-63, and as we have previously noted, *In re Globe Newspaper Co.*, 729 F.2d 47, 54 (1st Cir.1984) (citing *Providence Journal Co. v. F.B.I.*, 602 F.2d 1010, 1013 (1st Cir.1979)), an invasion of privacy is not over when an interception occurs, but is compounded by disclosure in court or elsewhere. The impact of this second invasion is not lessened by the circumstance that the disclosing party (here, the government) is merely the innocent recipient of a communication illegally intercepted by the guilty interceptor (here, Waters).

813 F.2d at 480-481.

The Sixth Circuit, however, professed to be unimpressed with the evident logic of this passage. Instead, pronouncing that "[w]e do not read *Gelbard* as broadly as did the *Vest* court," 63 F.3d at 1401, the opinion below sought to confine this Court's opinion in that case to the four corners of the procedural context out of which it arose:

> *Gelbard* involved a witness's challenge to a finding of civil contempt for refusing to testify before the grand jury, invoking as a defense the ground that the interrogation was to be based on information allegedly intercepted by illegal

> wiretapping and electronic surveillance conducted by federal agents. . . . The *Gelbard* Court's discussion of the legislative history of Section 2515, read in context of the facts of the case, emphasized not that individuals are just generally entitled to have their privacy protected, but that they are specifically entitled to protection from unscrupulous law enforcement procedures which invade their privacy. The point of *Gelbard* was that if the government was eventually shown to have illegally intercepted the conversations, then the witness was entitled under Title III to have that evidence suppressed and completely excluded from any line of questioning in any proceeding, including a grand jury proceeding. To cite *Gelbard* as standing for the proposition that the entire purpose of Title III is to prevent victimization in the form of invasion of privacy goes too far. As a result, we think that *Vest* was wrongly decided and we decline to follow it.

63 F.3d at 1401.

The Sixth Circuit's statement of the procedural context of this Court's decision in *Gelbard* is accurate enough, but hardly compelling. In *Gelbard*, the Court was faced with the question of the significance of disclosure of intercepted communications, and whether disclosure alone of an improperly intercepted communication would be a sufficient offense against the values which Congress sought to protect in Title III to justify the extraordinary step of interrupting the course of proceedings of a sitting federal grand jury to inquire into the legality of the acquisition of evidence before that evidence was disclosed, even in the secrecy of the grand jury proceedings.

In order to answer this question, of course, the Court had to examine the underlying congressional purpose in enacting the exclusionary rule of § 2515, and to determine whether the mere disclosure of previously (improperly) intercepted communications was of such significance in the overall statutory scheme as to justify the application of that provision to produce such an extraordinary result.

As *Gelbard* makes clear, however, Congress viewed disclosure of private conversations as an intrusion equivalent to their interception, and the exclusionary rule of § 2515 was crafted not only to serve the indirect purpose of deterring improper intrusions in the form of interceptions, but also the more direct purpose of preventing improper intrusions in the form of disclosures. And, as the Court's opinion also points out, it was meant to serve an additional purpose as well, wholly unrelated to deterrence – that of safeguarding the integrity of the judicial process:

> Section 2515 is thus central to the legislative scheme. Its importance as a protection for 'the victim of an unlawful invasion of privacy' could not be more clear. The purposes of § 2515 and Title III as a whole would be subverted were the plain command of § 2515 ignored when the victim of an illegal interception is called as a witness before a grand jury and asked questions based upon that interception. Moreover, § 2515 serves not only to protect the privacy of communications, but also to ensure that the courts do not become partners to illegal conduct: the evidentiary prohibition was enacted also 'to protect the integrity of court and administrative proceedings.' Consequently, to order a grand jury witness, on pain of imprisonment, to disclose

> evidence that § 2515 bars in unequivocal terms is both to thwart the congressional objective of protecting individual privacy by excluding such evidence and to entangle the courts in the illegal acts of Government agents.

408 U.S. at 50-51 (footnotes omitted).

Of course, allowing the use by the government in a trial in a United States District Court of communications which have been illegally intercepted by a private person has exactly the same effect: it "thwarts the congressional objective of protecting individual privacy by excluding such evidence," and it "entangle[s] the courts in the illegal acts of" the private person responsible for the interception. If one does not artificially constrain the teachings of *Gelbard* and its underlying inquiry into the legislative history of Title III to the specific procedural framework out of which it arose, that decision clearly commands the result reached in *Vest*, and rejected by the Sixth Circuit: that the "unequivocal terms" of § 2515 must be given effect, by excluding the use of unlawfully intercepted communications under the circumstances presented by this case.

This would not be so, of course, if Congress had not viewed the disclosure of improperly intercepted communications as an evil unto itself, or had intended the exclusionary rule of § 2515 solely as a deterrent – or if the focus of Congress' attention had only been on regulating improper interceptions, rather than on the broader goal of protecting personal privacy from the harm done as much (if not more) by disclosures as by interceptions. If this were the case, there might be some justification in

excusing the disclosure of improperly intercepted communications in circumstances like the case at bar – in balancing the greater good of effective law enforcement against the lesser evil of disclosure, where exclusion would not deter the greater evil of improper interception. But as this Court recognized in *Gelbard*, Congress had broader purposes in mind in enacting Title III in general, and § 2515 in particular, and in view of this recognition, there is simply no logic or justification in striking the balance as did the Sixth Circuit.

Due perhaps to its myopic view of the issue, this central teaching of *Gelbard* was lost on the court below. For guidance (or perhaps for comfort), the court turned instead to its own decision in *United States v. Underhill*, 813 F.2d 105 (6th Cir. 1987), a case which involved the government's attempt to introduce tapes made by the defendants themselves in furtherance of their illegal gambling business (and therefore in violation of Title III) in a prosecution for the very gambling violations in aid of which the interceptions were unlawfully made. The defendants' objection to the use of the tapes under the unequivocal prohibition of § 2515 led the *Underhill* court to note that their invocation of the statutory exclusionary rule would "turn the statute on its head:"

> We think it is clear that Congress did not intend for Sec. 2515 to shield the very people who committed the unlawful interceptions from the consequences of their wrongdoing. Underhill and Rokitka waived their right of privacy in these communications by their deliberate act of causing them to be recorded. If the language of Secs. 2511(2)(d) and 2515 were applied literally to Underhill and Rokitka it would produce an

> absurd result that we are confident Congress did not intend.

813 F.2d at 112.

The court below took *Underhill* as standing "for the proposition that the suppression provisions of Section 2515 are not absolute." 63 F.3d at 1402. Of course, the *Underhill* court's departure from obedience to the plain language of the statute was motivated solely by an extraordinary factor not present in the case at bar: that persons guilty of violating the statute were seeking the protection of a statutory provision intended to penalize, not reward, exactly those kinds of violations of the statutory scheme.

The correctness of the *Underhill* result is of course not before the Court, but *Underhill* illustrates a principle of statutory construction which is instructive in the case at bar, and went unrecognized and unheeded by the court below: that "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' " *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

Underhill arguably represented one such rare instance, as that opinion makes clear. But such departures from the rule of deference to the plain language of a statute are not favored. As this Court wrote in *Ardestani v. I.N.S.*, 502 U.S. 129, 135-136 (1991):

> The "strong presumption" that the plain language of the statute expresses congressional

> intent is rebutted only in "rare and exceptional circumstances," *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981), when a contrary legislative intent is clearly expressed. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432, n. 12, 107 S.Ct. 1207, 1213, n. 12, 94 L.Ed.2d 434 (1987); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980).

When enacting § 2515, Congress may not have contemplated precisely the situation posed by the instant case. The fact that Congress may not have intended to dictate a particular result in an unimagined situation does not, however, leave a court free to ignore the plain language of the statute that Congress wrote, or to rewrite it in the way the court would prefer, or may feel that Congress might have, had it debated the precise issue. It is enough, and it is conclusive, that the language of the statute dictates the result, and it is only in those rare instances where to follow the dictates of the statute as written would demonstrably violate the purpose of the legislation that a court may be free to disregard the plain language of the statute.

As this Court's review of the history and purpose of Title III and § 2515 in *Gelbard* make clear, the result reached by the First Circuit in *Vest*, and contended for by the Petitioner herein, is certainly not in any way inconsistent with the expressed intentions of Congress, even if the Court may harbor a suspicion that Congress may not have specifically intended to dictate it. As this Court explained in *Griffin v. Oceanic Contractors, Inc., supra*, 458

U.S. at 575, it would take far more than a merely unintended result to justify judicial rewriting of a solemnly enacted statute:

> It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available. See *United States v. American Trucking Assns., Inc.*, 310 U.S., at 542-543, 60 S.Ct., at 1063; *Haggar Co. v. Helvering*, 308 U.S. 389, 394, 60 S.Ct. 337, 339, 84 L.Ed. 340 (1940). In refusing to nullify statutes, however hard or unexpected the particular effect, this Court has said:
>
> > "Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts." *Crooks v. Harrelson*, 282 U.S. 55, 60, 51 S.Ct. 49, 50, 75 L.Ed. 156 (1930).

The opinion below did admit that the unusual circumstance which gave rise to *Underhill* – that the persons seeking suppression were themselves the unlawful interceptors – were not present in the case at bar, but it was not long deterred by this distinction. Nor did the court even allude to the line of cases referred to above. Rather, it turned to yet another of its own decisions, *United States v. Baranek*, 903 F.2d 1068 (6th Cir. 1990).

In *Baranek*, the Sixth Circuit held that § 2515 did not require suppression when a lawfully intercepted telephone was inadvertently left off the hook, allowing investigators to overhear conversations in the room where the

telephone was located. The defendant argued, and the district court had held, that the off-hook conversations were not within the scope of the authorized interception, but the Court of Appeals held that this nominal noncompliance with the statute would not foreclose the government's reliance on a "plain view" theory. Although the "plain view" exception to the warrant requirement determines the legitimacy of a search, rather than the scope of the exclusionary rule, the *Baranek* opinion somewhat muddied the distinction, and rested its decision at least in part on a perceived lack of necessity to read § 2515 as broadly as its language might suggest, in a passage upon which the court below relied:

> Where, as here, we have a case with a factual situation clearly not contemplated by the statute, we find it helpful on the suppression issue (as opposed to the question of whether there was a violation of the authorization order) to look to fourth amendment law. We note in that regard that government agents are charged with no wrongdoing and that to suppress here would have no impact on the future conduct of law enforcement officials. In the usual fourth amendment calculus, these are factors that counsel against the necessity of suppression.

903 F.2d at 1072.

The opinion of the Sixth Circuit in the case at bar likened the situation here to that in *Baranek*, where, as the court there described it, "the government got a lucky break of sorts here and stumbled across the evidence." Of course, the *Baranek* court's justification for admission of the challenged evidence – that "the government agents are charged with no wrongdoing" – can only mean, since

the interceptions were conducted by those agents, that those conversations, unlike the ones in the case at bar, were not "unlawfully intercepted," so that their further disclosure would be a separate and independent violation of Title III. This distinction was, however, lost on the court below, which focused instead on the fact that the government was not alleged to have been involved in any improper interception in the case at bar either, yet stood to lose the benefit of the "lucky break" it received when Mrs. Murdock chose to (unlawfully) disclose the fruits of her own unlawful interceptions.

Ignored as well by the court below was the perceived "uniqueness" of the situation faced by the *Baranek* court, and its perception that it was "clearly not contemplated" by Congress – unlike the situation in the case at bar, where the wrong complained of by Petitioner – the disclosure in a federal court proceeding of unlawfully intercepted wire communications – was one which was precisely within the scope of the statute, and clearly forbidden by § 2515. While that provision does not condition the exclusion of unlawfully intercepted evidence on whether the result is likely to have a deterrent effect on anyone in particular, the court below justified allowing the government the benefits of its "lucky break" on the basis that there was no government misconduct to deter. It quoted with approval the district court's pronouncement on this subject: "The intent of Congress would certainly have been followed had section 2515 served to deter *Mrs. Murdock*, but no deterrent effect is worked on the government in this case." 63 F.3d at 1403 (emphasis added by Court of Appeals).

If anything, this statement proves too much; any time an illegal search has taken place it is evidence that the perpetrator has not been deterred. Whether or not the Mrs. Murdocks of the world would be deterred if the courts denied them an outlet for the fruits of their violations of Title III, whether directly or through the intervening agency of the government, is not a question which admits of a ready answer on the record below. It is also a question which need not even be asked in the context of the case at bar, because Congress has spoken clearly and unequivocally in § 2515 to deny the fruits of such unlawful interceptions a home in the federal court system.

In this connection, however, two additional things are also clear: that Mrs. Murdock was among the class of persons, and her activities of a kind, that Congress intended to reach, and to deter, and that, by turning the tapes she unlawfully made over to third persons, she got exactly what she wanted: to see her husband punished for what the unlawfully recorded conversations revealed.

It is clear that Congress intended, in enacting Title III, to absolutely prohibit private electronic surveillance, which was viewed as representing a major threat to personal privacy. See, *e.g.*, *Heggy v. Heggy*, 944 F.2d 1537, 1540-1541 (10th Cir. 1991); *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976). A comprehensive scheme of regulation of private activity was intended. As Professor Carr has noted, the "statute represents an effort to introduce federal legislative control over private activities not normally reached by the commerce clause." James G. Carr, The Law of Electronic Surveillance § 3.6, pp. 3-110.3-3.110.4 (2d Ed. 1986). That the Mrs. Murdocks of the world are as clearly within the class of persons whom

Congress intended to deter from unlawful interception as agents of the government is beyond dispute.

The court below took it upon itself to rewrite the statute on the basis that to enforce its explicit provisions would not further its deterrent purposes, since the proponent of the evidence, the government, was not involved in the wrongful interception. But what of Mrs. Murdock? Should the fact that the government received the fruits of her wrongdoing on a proverbial "silver platter" cleanse them of the taint of that wrongdoing, given the fact that in enacting Title III Congress clearly intended to forbid and punish behavior such as hers by people such as she?

In *Elkins v. United States*, 364 U.S. 206 (1960), this Court abolished the so-called "silver platter" doctrine, under which federal courts admitted evidence which had been seized by state officers by means which would have violated the Fourth Amendment if undertaken by federal agents. Those state-conducted searches violated the Fourteenth Amendment, but because *Mapp v. Ohio*, 367 U.S. 643 (1961) had not yet been decided, they were not subject to the exclusionary rule that applied to searches and seizures that violated the Fourth Amendment under *Weeks v. United States*, 232 U.S. 383 (1914), and previous decisions of this Court had upheld the admission of such evidence so long as the federal government played no part in the unlawful search or seizure itself.

The *Elkins* Court, however, held the practice intolerable for a number of reasons. The Court noted that "[t]he Constitution is flouted equally" whether a state or federal officer conducts the wrongful search, that "[t]o the victim it matters not whether his constitutional right has been

invaded by a federal agent or by a state officer," and, in addition, that "there is another consideration – the imperative of judicial integrity;" to allow the admission of illegally seized evidence makes the federal courts "accomplices in the willful disobedience of a Constitution they are sworn to uphold." 364 U.S. at 215, 223.

As has been noted, Title III was enacted to prohibit and deter people exactly like Mrs. Murdock from doing exactly what she did, to an even greater extent than it was intended to reach the actions of government agents – its prohibitions against private action are absolute, while certain government agents may lawfully conduct interceptions subject to judicial approval. Thus, "it is flouted equally" whether Mrs. Murdock or Special Agent Smith conducts the unlawful interceptions.

Of course, to a person in the position of Petitioner "it matters not" whether the right of privacy which Title III was meant to secure to him is invaded by Mrs. Murdock or Special Agent Smith. And, most importantly of all, the "imperative of judicial integrity" which, as this Court recognized in *Gelbard*, is expressed in § 2515, is violated as clearly no matter what the source of the unlawfully acquired evidence.

If this were a civil action brought by Mrs. Murdock against her husband, the tapes would surely not be admissible. And if, through Special Agent Smith, or anyone else, Mrs. Murdock seeks to get by indirection what she could not get directly, how can it be said that it would be inappropriate to enforce the explicit rule of exclusion found in the statute which was intended to protect and

vindicate the very right of privacy through the violation of which she would have her revenge?

Title III was intended to secure the very same right of privacy from intrusion by public agencies and private individuals, in the same way the Fourth and Fourteenth Amendments protect identical privacy interests from intrusion by federal and state officers. The same principles that dictated the result in *Elkins* dictate the same result here: that the privacy interests meant to be secured by Title III cannot be adequately protected if private violations can be insulated from scrutiny, much less rewarded, by the introduction of their fruits into evidence in federal courts through the medium of the "clean hands" of federal officials.

The opinion below, however, concluded from an "independent reading of the legislative history of Title III" that:

> while privacy was a major goal of the legislation, it was privacy in a particular context, namely, that an individual who is the victim of an unlawful interception is entitled to protection in court proceedings from any attempt by the perpetrator to use the interception against the victim or in any way to benefit from the information which was either contained in, or was the fruit of, the unlawful interception.

63 F.3d at 1403.

It is not difficult to understand why the court does not cite chapter and verse to support this "independent reading" of the legislative history: the limitations suggested on the scope or impact of the statute's rule of exclusion are simply nowhere to be found. Nor, of course,

are such limitations found in the product of that legislative history: the clear, explicit, and unequivocal provisions of § 2515, which is entirely consistent with the statutory scheme as a whole in treating each and every disclosure of an unlawfully intercepted communication – without reference to by whom it is made – as a separate violation.

This is of course not the case where only the proscriptions of the Fourth Amendment are involved. As this Court noted in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) the Fourth Amendment "prohibits 'unreasonable searches and seizures' whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is 'fully accomplished' at the time of an unreasonable governmental intrusion." (quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974)).

Nevertheless, on the basis of the general pronouncement that "Fourth Amendment law is also instructive here," the Sixth Circuit defended the result in the case at bar as being consistent with the Fourth Amendment "private search" cases:

> It is well established that evidence obtained by a private search is not subject to the Fourth Amendment exclusionary rule. In *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984), the Supreme Court acknowledged that the Fourth Amendment protection against unreasonable searches and seizures "is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.' " *Id.* at 113, 104 S.Ct. at

> 1656 (quoting *Walter v. United States*, 447 U.S. 649, 662, 100 S.Ct. 2395, 2404, 65 L.Ed.2d 410 (1980) (Blackmun, J., dissenting)

63 F.3d at 1403 (footnote omitted).

What the opinion below ignores, of course, is the reason behind the rule in the "private search" cases: "that a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment." *Walter v. United States*, 447 U.S. 649 (1980). An equivalent statement cannot, of course, be made in the context of the case at bar, since, as noted at length above, the conduct of the private individual who acquired the evidence that the government now seeks to use did indeed violate Title III, whose exclusionary rule Petitioner seeks to invoke.

Actually, when properly read, the "private search" cases, such as *Walter v. United States, supra*, and *United States v. Jacobsen*, 466 U.S. 109 (1984), are consistent with Petitioner's position. Typically, those cases involve situations where a private citizen has performed an initial search or seizure and turned over the object or information he has acquired thereby to the authorities. The cases hold that "[t]he additional invasions of . . . privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search." *Jacobsen, supra*, 466 U.S. at 115. If there is an additional intrusion by the government, it is subject to the same scrutiny as if private action had not initiated the chain of events: "surely the Government may not exceed the scope of the private search unless it has the right to make an independent search." *Walter, supra*, 447 at 657.

In the case of a conventional search or seizure, the Fourth Amendment is violated only by the intrusion represented by the search or seizure itself, not by the disclosure of the fruits of that intrusion – the Fourth Amendment exclusionary rule is an entirely judge-made construction. By contrast, in the case at bar, each disclosure of the unlawfully intercepted communications – including their use as evidence by the government – would surely be an additional intrusion of a kind particularly identified and protected by Title III. An obvious analogy may be drawn to the sort of "additional invasions . . . of privacy by the government" that are subject to the Fourth Amendment's exclusionary rule under the "private search" cases.

The "private search" cases hold that the fact that the chain of events began with private action does not insulate subsequent government conduct from Fourth Amendment scrutiny. Likewise, the fact that the chain of events in the instant case began with private action should not excuse the government's attempt to disclose the fruits of that private action in a manner that would be plainly violative of Title III. If an "additional invasion" violated the Fourth Amendment, it would be subject to the Fourth Amendment. Similarly, the government action in the case at bar – the proposed use of the unlawfully intercepted communications at Petitioner's trial – would be in violation of § 2511, which is the appropriate governing law, and should likewise be held to be subject to exclusion under the unequivocal provisions of § 2515.

In *United States v. Giordano*, 416 U.S. 505, 527 (1974), this Court held that in enacting Title III:

> Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.

Specifically, the *Giordano* opinion concluded that Congress intended that suppression of evidence was to be the remedy for violations of those provisions which were "intended to play a central role in the statutory scheme." 416 U.S. at 528. In *United States v. Vest, supra*, 813 F.2d at 481, the First Circuit wrote that suppression was appropriate because:

> The protection of privacy from invasion by illegal private interception as well as unauthorized governmental interception plainly "play[s] a central role in the statutory scheme," see *United States v. Giordano*, 416 U.S. 505, 528 (1974).

In the case at bar, the Sixth Circuit criticized the *Vest* court's reliance on *Giordano, supra*, on the basis that *Giordano* "can clearly be distinguished as a case in which the government itself had failed to comply with the terms of the statute and thereby wrongfully procured a wiretap from which evidence sought to be admitted had been obtained," and opined that the *Giordano* court's pronouncements regarding the statutory scheme are inapposite in this case, where "the government played no part in the unlawful interception." 63 F.3d 1404.

Once again, the court below failed to see the forest for the trees. This Court's opinion in *Giordano* represented an analysis of the role that the statutory exclusionary rule played in the overall structure of Title III. It is, as the *Vest* court concluded, convincing authority for the proposition that where, as here, both the interception and disclosure of Petitioner's communications would violate the most basic provisions of Title III, resort to the statute's unequivocal rule of exclusion is not only appropriate, but necessary.

CONCLUSION

The decision of the Sixth Circuit in the case at bar is in fundamental conflict with the decision of the First Circuit on the same issue, and with a number of decisions of this Court with respect both the statutory scheme involved and the role of the judiciary in the interpretation and application of statutes. It infringes upon basic and important rights secured to your Petitioner, and it bespeaks a need for an authoritative pronouncement on the issue involved from this Court. The Court should grant the within Petition for Certiorari, and, on plenary hearing, vacate the decision below.

Respectfully submitted,

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DATED: January 2, 1996

No. 94-1984

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* HAROLD D. MURDOCK, *Defendant-Appellant.*	)	ON APPEAL from the United States District Court for the Eastern District of Michigan

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Decided and Filed August 23, 1995

Before: JONES and NORRIS, Circuit Judges; DOWD, District Judge.*

DOWD, District Judge.

I. Introduction

The defendant-appellant prosecutes an appeal from his conviction on one count of tax evasion in violation of 26 U.S.C. § 7201 based on his failure to report as income the sum of $90,000.00 he received as a bribe in his capacity as the President of the Board of Education of the

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* The Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

Detroit Public Schools. Prior to entering his *Alford* plea of guilty, the defendant unsuccessfully challenged the admissibility of an intercepted telephone conversation which disclosed the bribe. The appellate issue is whether the district court erred in overruling Murdock's motion to suppress the telephone conversation.

II. Factual and Procedural Background

Harold D. Murdock (hereafter, "Murdock"), while serving as the President of the Detroit School Board, became embroiled in a divorce action with his wife (hereafter, "Mrs. Murdock") with whom he owned and operated a funeral home. In the Spring of 1985, Mrs. Murdock became suspicious of Murdock's conduct, both business and personal, and decided to record telephone calls of the funeral home on business extension phones in her home located next to the funeral home.[1] She purchased the recording equipment from Radio Shack, attached it to the two business extensions in her home, along with on/off switches which permitted her to control the operation of the tape recorders, and systemically recorded phone calls for about three months.[2] After Mrs. Murdock's son by an earlier marriage advised her that the recording was

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[1] Mrs. Murdock had lived alone in this house since her separation from Murdock in 1984.

[2] Mrs. Murdock did not record *all* calls. Rather, she generally recorded incoming and outgoing calls only when she knew Murdock was at the funeral home and she was not there. In addition, she did not monitor the calls that were being taped. Consequently, some of the tapes contained conversations of employees of the funeral home.

unlawful, she stopped the practice. By the time she stopped, she had accumulated two shoe boxes of taped conversations that she had logged and described.[3] Later, a story in a Detroit newspaper describing the action of the Detroit School Board with respect to a milk contract with a local dairy led Mrs. Murdock to believe that her husband had engaged in the act of bribery. She thought this because of the content of one of the intercepted and recorded conversations which she had heard, a conversation with an official of the dairy. Acting anonymously, she made an extract of the conversation and mailed it to the dairy that had lost the milk contract. The recipient turned it over to the Wayne County Prosecuting Attorney and a newspaper. The newspaper published an article outlining the bribery scheme. As a result of the story, federal agents began a criminal investigation and, eventually, the defendant was indicted for income tax evasion because the $90,000 bribe was not reported as income.[4]

Murdock moved to dismiss the indictment or, in the alternative, to suppress the taped conversation based on the exclusionary provisions of 18 U.S.C. § 2515.[5] The

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[3] Mrs. Murdock eventually destroyed the tapes and her log in 1992.

[4] Tax evasion is an "offense[ ] against the laws of the United States" under 18 U.S.C. § 3231.

[5] 18 U.S.C. § 2515 provides: "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the

district court agreed with the government's position that, by reason of the provisions of Section 2510(5)(a), the statutory prohibitions involving intercepted conversations did not apply to an extension line of a business phone or to a recording made of a captured conversation. Alternatively, the district court held that the statutory exclusion provisions of Section 2515 did not apply to the government where it played no part in the interception of the conversation. Consequently, the district court denied Murdock's motion to exclude the intercepted conversation.

Murdock entered a conditional plea of guilty under a plea agreement wherein he reserved his right to appeal.[6] The district court sentenced Murdock to one year and one day in prison and imposed a $5000 fine. Murdock is free on bond pending this appeal.

III. Discussion

A. Issue on Appeal and Standard of Review

The issue on appeal is whether the district court erred in overruling Murdock's motion to suppress the

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disclosure of that information would be in violation of this chapter."

[6] The Rule 11 Plea Agreement stated, in relevant part, that the "condition will be the defendant's reserving of a right to appeal [the] Court's Memorandum Opinion and Order Denying Defendant's Motion for Rehearing dated January 4, 1994, which denied Defendant's Motion to Dismiss and/or Suppress Evidence. If defendant prevails on appeal he shall be allowed to withdraw his plea." (J.A. at A-164).

tape recording. To decide this issue, the court must examine the statutory framework of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, codified at 18 U.S.C. §§ 2510-2521. The court reviews the district court's conclusions of law *de novo* and its factual findings for clear error. *United States v. Martin*, 25 F.3d 293, 296 (6th Cir. 1994).

B. The Extension Telephone Exemption – 18 U.S.C. § 2510(5)(a)

Our analysis begins with the recognition that Section 2511(*l*)(a) makes it unlawful for "any person" to "intentionally intercept[ ]" any "wire, oral, or electronic communication[.]" Sections 2510(4) and (5), read together, establish an exemption for certain devices, including extension telephones. Known as the "telephone extension exemption" or the "business extension exemption," it "places outside the reach of Title III the monitoring of communications carried out by certain types of equipment and done in the ordinary course of business." *Williams v. Poulos*, 11 F.3d 271, 279 (1st Cir. 1993).

Section 2510(4) defines an interception as "aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device[.]"

Section 2510(5) defines an "electronic, mechanical, or other device" as

> any device or apparatus which can be used to intercept a wire, oral, or other communication other than –

> (a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business[.] . . .

Following an extensive evidentiary hearing, the district court concluded that Section 2510(5)(a)(i) was intended to cover tape recorders attached to extension phones. Acknowledging that the Sixth Circuit had not yet ruled on that issue, the district court cited *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), *cert. denied*, 419 U.S. 897 (1974); *United States v. Harpel*, 493 F.2d 346 (10th Cir. 1974); *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977); *Epps v. St. Mary's Hosp. of Athens, Inc.*, 802 F.2d 412 (11th Cir.), *reh'g denied*, 807 F.2d 999 (1986); and *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991), *cert. denied*, 502 U.S. 1044 (1992), in support of his conclusion that the Radio Shack recording equipment, when combined with the extension telephone, came within the exemption.

We find better reasoning in three recent decisions: *Deal v. Spears*, 980 F.2d 1153 (8th Cir. 1992), *Williams v. Poulos*, *supra*, and *Sanders v. Robert Bosch Corp.*, 38 F.3d 736 (4th Cir. 1994), *reh'g and suggestion for reh'g en banc denied* (January 24, 1995) (No. 93-2351, 93-2423). We shall follow them rather than the decisions of the Second, Fifth, Tenth and Eleventh Circuits relied upon by the district court.

1. "Interception" – 18 U.S.C. § 2510(4)

In the Eighth Circuit case of *Deal v. Spears*, *supra*, the plaintiff, a former employee of the defendants,

prosecuted a civil action seeking compensatory and punitive damages after the plaintiff learned that her employers, who lived in a mobile home adjoining the convenience store where she was employed, had intentionally intercepted and disclosed her telephone conversations. The defendants had suspected the plaintiff of providing inside information which facilitated an earlier burglary of the store. They installed a recording device on the extension phone in the mobile home and recorded 22 hours of Deal's conversations. One of the persons with whom Deal had extensive conversations was the co-plaintiff and the district court noted that much of the conversation was "sexually provocative." The Deal court concluded:

> Thus there are two essential elements that must be proved before this [the telephone extension exemption] becomes a viable defense: the intercepting equipment must be furnished to the user by the phone company or connected to the phone line, and it must be used in the ordinary course of business. The Spearses argue that the extension in their residence, to which the recorder was connected, meets the equipment requirement, and the listening-in was done in the ordinary course of business. We disagree.
>
> First, we are not as easily convinced as is at least one of our sister circuits that an extension telephone is exempt equipment under section 2510(5)(a)(i) when a recording device is attached to the extension to record calls for later listening. *See Epps v. Saint Mary's Hosp. of Athens, Inc.*, 802 F.2d 412, 415 (11th Cir. 1986) (holding that the interception device was not the equipment used to record the conversation but the dispatch

console to which the recorder was attached). The calls would not have been heard or otherwise acquired – that is, intercepted – at all but for the recording device, as the Spearses did not spend twenty-two hours listening in on the residential extension. When turned on, the recorder was activated automatically by the lifting of the handset of either phone, even though it was connected only to the extension phone. Further, Deal ordinarily would know (by the "click" on the line) when the residential extension was picked up while she was using the store phone; thus her calls likely would not have been intercepted if the recorder had not been in place.

It seems far more plausible to us that the recording device, and not the extension phone, is the instrument used to intercept the call. We do not believe the recording device falls within the statutory exemption. The recorder was purchased by Newell Spears at Radio Shack, not provided by the telephone company. Further, it was connected to the extension phone, which was itself the instrument connected to the phone line. There was no evidence that the recorder could have operated independently of the telephone.

We hold that the recording device, and not the extension phone, intercepted the calls. But even if the extension phone intercepted the calls, we do not agree that the interception was in the ordinary course of business.

Deal v. Spears, 980 F.2d at 1157-58.[7]

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[7] The issue of recording as opposed to listening was alluded to by way of dictum in *United States v. Jones*, 542 F.2d 661

The First Circuit case of *Williams v. Poulos, supra,* was one of several bankruptcy and civil actions which arose from the demise of Consolidated Auto Recyclers, Inc. ("CAR"). Without reviewing the entire factual scenario, suffice to say that CAR principals, trying to get a $1,000,000 monthly telephone bill under control, decided to install a telephone surveillance system which would monitor a single, pre-selected telephone at CAR headquarters. Shortly thereafter, control of the financially-strapped CAR was transferred to Allied Capital Corporation ("Allied"), a venture capital firm. In a short time, the relationship between the new CEO, Ralph Dyer, and CAR's principals soured. CAR's principals wanted to regain control of CAR. They began to target their surveillance equipment on Dyer's conversations as well as on conversations between Allied personnel at CAR and Allied headquarters. Eventually, CAR's principals, attempting to gain an advantage in their quest to regain control, disclosed the fact of their telephone taping and some of the damaging information the tapes revealed. Allied filed an action alleging violations of federal and state wiretapping laws. Dyer intervened. Ultimately, plaintiff prevailed in the case, following a six-day bench trial. The district court ruled that the CAR principals violated the wiretap statutes. Cross-appeals were taken on various issues. The First Circuit affirmed the district

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(6th Cir.1976), when it rejected the principle that there was an interspousal wiretapping exception under Title III and observed "that there is a vast difference between overhearing someone on an extension and installing an electronic listening device to monitor all incoming and outgoing telephone calls." *Id.* at 673 n. 24.

court. The Williams court described the monitoring system utilized by CAR as "alligator clips attached to a microphone cable at one end" and an "interface connecting [a] microphone cable to a VCR and a video camera on the other." *Williams v. Poulos*, 11 F.3d at 280 (internal quotes omitted). The court concluded that the monitoring device was not a "telephone or telegraph instrument, equipment or facility, or a[ ] component thereof[.]" *Id.* (internal quotes and footnote omitted). The court stated that "it [is] self evident that the CAR system, far from being the type of exempt equipment contemplated by the authors of the business extension exception, is precisely the type of intercepting device Congress intended to regulate heavily when it enacted Title III." *Id.*

The Fourth Circuit case of *Sanders v. Robert Bosch Corp., supra,* involved a plaintiff who was a security officer whose employer, Guardmark, Inc., contracted to provide security services to Robert Bosch Corp. ("Bosch"). Sanders was assigned to work at Bosch, where she answered telephones in the security office. Bosch, allegedly because it had received bomb threats, installed a tape recording device known as a "voice logger" to record all telephone conversations. Sanders filed suit against Bosch alleging that Bosch had violated her rights under Title III by recording, without her knowledge, all of her telephone conversations. The district court held that Bosch unlawfully intercepted Sanders' conversations because Bosch could not enjoy the business extension exemption. On appeal, the Fourth Circuit stated that "recording of a telephone conversation alone constitutes an 'aural . . . acquisition' of that conversation." *Sanders v. Robert Bosch Corp.*, 38 F.3d at 740 (footnote and citations

omitted). Thus, the recording of conversations was an interception "unless the recordings were not effected 'through the use of any electronic, mechanical, or other device.' " *Id.* Although Bosch's argument was that its voice logger was not an "electronic, mechanical, or other device" because it fell within the business-use exception, the court of appeals affirmed the district court's holding to the contrary. Citing both *Deal v. Spears* and *Williams v. Poulos*, the Fourth Circuit concluded that Bosch's voice logger did not meet the two prongs of the test for the exception: "First, the voice logger must constitute a 'telephone or telegraph instrument, equipment or facility, or a[ ] component thereof,' either provided by, and installed by, BellSouth in the ordinary course of *its* business or, equivalently, supplied by Bosch for connection to BellSouth facilities; second, Bosch's use of the voice logger must fall within the ordinary course of its business." *Id.*

We are convinced that *Deal*, *Williams*, and *Sanders* are the best expressions of the law. Therefore, we conclude that the recording mechanism (a tape recorder connected to extension phones in Mrs. Murdock's home) does not qualify for the telephone extension (or business extension) exemption.

2. "Ordinary Course of Business" – 18 U.S.C. § 2510(5)(a)(i)

We discuss this issue, even though we have concluded as a threshold matter, that the Radio Shack equipment did not meet the Section 2510(5)(a)(i) requirements. Assuming that the Second, Fifth, Tenth and Eleventh

Circuits are correct in their analysis and that we are in error to follow the First, Fourth and Eighth Circuits on the threshold issue, the second issue is whether Mrs. Murdock was intercepting and recording the telephone calls in the ordinary course of her business as a subscriber or user of the telephone extension.

Mrs. Murdock testified that her purpose was to check on her husband's business dealings related to their mutual funeral business and also to check on his possible marital infidelities.

A substantial body of law has developed on the subject of ordinary course of business in the employment field where employees have sued their employers. *See, e.g., Deal v. Spears, supra; Epps v. St. Mary's Hosp. of Athens, Inc., supra; Watkins v. L.M. Berry & Company,* 704 F.2d 577 (11th Cir. 1983); *Briggs v. American Air Filter Co., Inc.,* 630 F.2d 414 (5th Cir. 1980). These cases have narrowly construed the phrase "ordinary course of business." The *Briggs* court declined to consider whether a general practice of random monitoring of employee phone calls could ever be justified under the provisions of Section 2510(5)(a)(i), but did declare that when an employee's supervisor has particular suspicions about confidential information being disclosed to a business competitor, has warned the employee not to disclose the information, has reason to believe that the employee is continuing to disclose the information and knows that a particular phone call is to an agent of the competition, it is within the ordinary course of business to listen in on an extension phone for at least as long as the call involves the type of information the supervisor fears is being disclosed. The *Deal* court found that the indiscriminate recording of 22

hours of calls and subsequently listening to them was beyond the "ordinary course of business." The *Watkins* court held that a personal call may not be intercepted in the ordinary course of business under the exemption in Section 2510(5)(a)(i), except to the extent necessary to guard against unauthorized use of the telephone or to determine whether or not a call is personal. The *St. Mary's Hospital* court followed the reasoning of *Watkins* and found that the intercepted call was not personal but did relate to the business of the employer and was thus intercepted in the ordinary course of the hospital's business.

We find that the indiscriminate recording of both incoming and outgoing calls by Mrs. Murdock does not constitute conduct within the ordinary course of the funeral home business in which she had an interest as a part owner.

This case is unique, however, in that Mrs. Murdock had a dual purpose in recording the phone calls. She was also concerned about her marriage and the alleged conduct of Murdock that threatened the marriage. As previously noted, the Sixth Circuit does not recognize a spousal immunity or exception to Title III. *United States v. Jones, supra.* The area of domestic disputes, along with the area of employment litigation, has been a fertile field for civil actions alleging a violation of Title III.

The issue that emerges is whether the telephone extension exemption is applicable under any set of circumstances in this circuit given the decision in *Jones* that Title III does apply to interspousal wiretapping within the marital home. The district court opined that the

efforts of Mrs. Murdock in taping her husband's conversations fell within the ordinary course of business and cited the *Simpson* and *Anonymous* courts as support. The *Simpson* court had stated that "it is clear that Congress did not intend to prohibit a person from intercepting a family member's telephone conversations by use of an extension telephone in the family home," *Simpson v. Simpson*, 490 F.2d at 809, and the district court appeared to rely on that citation to find that Mrs. Murdock's indiscriminate taping of conversations fell within the "ordinary course of business."

Simpson recognized what is generally referred to as the interspousal exemption with respect to wiretapping in the marital home. The case involved a civil suit by a former wife against her former husband who had used a wiretap and recording device to capture her conversations with another man that were described as mildly compromising. The opinion focused on the inadequacy of the legislative history as to whether interspousal wiretapping was a target of Title III and then pointed to the telephone extension exception contained in Section 2510(5)(a)(i), along with the presence of criminal penalties for a violation of Title III, to support its conclusion that there was no federal cause of action for the redress of the former wife's grievances against her former husband. It is noteworthy that *Simpson* did not make the declaration that the husband's conduct fell within the Section 2510(5)(a)(i) exception, but rather that the exemption was indicative of Congress's intention to abjure from deciding a very intimate question of familial relations: that of the extent of privacy family members may expect within the home vis-a-vis each other.

Two years later in *United States v. Jones, supra,* this circuit rejected *Simpson* to the extent it could be read as proclaiming a broadly-based interspousal exemption for wiretapping. Jones had been indicted for intercepting telephone conversations with his estranged wife and using the contents of the intercepted communications in violation of 18 U.S.C. § 2511(1)(a) and (d). The district court, in reliance on *Simpson,* dismissed the indictment. The government appealed and the dismissal was reversed. Jones, like the former husband in *Simpson,* had placed a bug on the telephone and intercepted his wife's conversations. The *Jones* court, like the court in *Simpson,* referred to the legislative history and then opined:

> The *Simpson* Court noted that the majority of the legislative history dealt with electronic surveillance by law enforcement officials and found the discussion of private surveillance to be inconclusive on the desired scope of the Act's prohibitions. 490 F.2d at 807. However, the legislative history leaves no doubt that the Act was intended to reach private electronic surveillance and that Congress was aware that a major area of use for surveillance techniques was the preparation of domestic relations cases. Professor Robert Blakey, publicly credited with being the author of Title III, testified before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee that:
>
> > [P]rivate bugging in this country can be divided into two broad categories, commercial espionage and marital litigation.
>
> Congressional awareness that the Act's prohibition of private surveillance would be applicable to domestic relations investigations is reflected

in the comments of Senator Hruska, one of the co-sponsors of the bill, which were joined by Senators Dirksen, Scott and Thurmond:

> A broad prohibition is imposed on private use of electronic surveillance, particularly in domestic relations and industrial espionage situations.

Our review of the legislative history of this section, testimony at congressional hearings, and debates on the floor of Congress, inescapably lead to the conclusion that 18 U.S.C. § 2511(1)(a) establishes a broad prohibition on all private electronic surveillance and that a principal area of congressional concern was electronic surveillance for the purposes of marital litigation.

The *Simpson* Court was privy to many of the same materials which were reviewed by this Court. *See* 490 F.2d at 806-809 nn. 8-16. However in *Simpson* their importance was discounted because the Court distinguished between unaided surveillance by a spouse and surveillance involving a third-party, even if instigated by the spouse. 490 F.2d at 809. This distinction has been seized upon in a subsequent case. *See Remington v. Remington*, 393 F.Supp. 898, 901 (E.D. Pa. 1975). In our view, it is a classic "distinction without a difference." For purposes of federal wiretap law, it makes no difference whether a wiretap is placed on a telephone by a spouse or by a private detective in the spouse's employ. The end result is the same – the privacy of the unconsenting parties to the intercepted conversation has been invaded. It is important to recognize that it is not just the privacy of the

> targeted spouse which is being violated, but that of the other party to the conversation as well.

United States v. Jones, 542 F.2d at 668-670 (footnotes omitted).

Anonymous v. Anonymous, supra, became the third case to examine whether Title III applied to interspousal wiretaps used in preparation for divorce litigation. *Anonymous*, like *Simpson*, involved a civil suit brought by an ex-wife who contended that her ex-husband had taped her telephone conversations with her eight-year-old daughter while the daughter was in the exclusive custody of the ex-husband. The district court dismissed the complaint and the decision was affirmed on appeal. The *Anonymous* court declared that it would have been lawful for the father to have listened to mother-daughter phone calls on a telephone extension because it would have constituted a use in the ordinary course of business sanctioned by Section 2510(5)(a)(i). The court concluded that the taping of the phone calls constituted "a distinction without a difference." *Anonymous v. Anonymous*, 558 F.2d at 679 (citing *Simpson*, 490 F.2d at 809). The *Anonymous* court observed that the extension telephone exemption was not available in the *Jones* case and further noted that the defendant in *Jones* "invaded the privacy of innumerable persons, known and unknown[,]" *Id.*, a fact which, in the *Anonymous* court's view, removed that case from the province of mere domestic conflicts. The court then concluded that the *Jones* court had correctly held that the federal wiretap statutes proscribed the defendant's alleged conduct.

Heggy v. Heggy, 944 F.2d 1537 (10th Cir. 1991), *cert. denied*, 503 U.S. 951 (1992), provided the Tenth Circuit with the opportunity to examine whether Title III civil actions were subject to an interspousal wiretapping exemption. The district court rejected the holdings of *Simpson* and *Anonymous* and joined the Fourth, Sixth and Eighth Circuits in holding that spousal wiretapping is actionable under Title III. The defendant-appellant husband had installed a recording device on the extension telephone located in a barn adjacent to the marital home at a time when he and the plaintiff-appellee wife were living together and prior to their eventual divorce. The husband used the wiretap to record his wife's conversations for nearly three months and played at least one of the conversations for his secretary. The husband was the Director of the Oklahoma Bureau of Narcotics and Dangerous Drugs. He testified at trial that he had been receiving death threats by telephone and wanted to record them. The opinion recites that the jury rejected the husband's explanation for the taping and awarded substantial compensatory and punitive damages. The opinion focuses on what is described as the appellant's central argument, i.e., that the district court erred in ruling that Title III applies to interspousal wiretapping within the marital home by failing to follow *Simpson*. The *Heggy* opinion rejected *Simpson* and opined:

> We reject not only the *Simpson* court's method of statutory analysis but also its interpretation of the legislative history. Instead, we agree with the district court that the legislative history of Title III evinces a congressional awareness of the widespread use of electronic eavesdropping in domestic relations cases and

an intent to prohibit such eavesdropping. *See* Remarks of Sen. Long, Hearings on Invasions of Privacy Before the Subcomm. on Admin. Practice and Procedure of the Sen. Comm. on the Judiciary, 89th Cong. 1st Sess., part 5 at 2261 (1965-66) ("The three large areas of snooping in this [non-governmental] field are (1) industrial (2) divorce cases, and (3) politics. So far, we have heard no real justification for continuance of snooping in these areas.").

Professor Robert Blakey, generally credited as the architect of Title III, testified that "private bugging in this country can be divided into two broad categories, commercial espionage and marital litigation." Hearings on the Right to Privacy Act of 1967 Before the Subcomm. on Admin. Practice and Procedure of the Sen. Comm. on the Judiciary, 90th Cong., 1st Sess., part 2 at 413 (1967). Senator Hruska, a co-sponsor of the bill, commenting on the scope of the statute, noted that "[a] broad prohibition is imposed on private use of electronic surveillance, particularly in domestic relations and industrial espionage situations." S.Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 2110, 2112, 2274.

Moreover, and in light of the split of judicial authority, had it been the intent of Congress to keep interspousal wiretapping beyond the reach of Title III, Congress could have expressly excluded such wiretapping when it overhauled Title III in the Electronic Communications Privacy Act of 1986, Pub.L. No. 99-508, 100 Stat. 1848. Although the Privacy Act amendments

> touched nearly every section of Title III, Congress did not codify the judicially created exception for interspousal wiretapping found in *Simpson*.
>
> * * *
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> . . . It is highly unlikely, as some courts have suggested, *see Lizza v. Lizza*, 631 F.Supp. 529, 533 (E.D.N.Y. 1986), that applying Title III to interspousal wiretapping will result in increased federal regulation of domestic relations. Rather, the more likely result is a decrease in interspousal wiretapping. *See Wiretapping and Modern Marriage*, 91 Dick. L.Rev. at 882-83.

Heggy v. Heggy, 944 F.2d at 1540-41 (footnotes omitted).[8]

Since the *Anonymous* court ruled, a series of decisions involving Title III and the telephone extension exemption in a family setting involving children have emerged. In *Newcomb v. Ingle, supra*, the act of a custodial parent in taping a minor child's conversation within the family home was determined to be permitted by a broad reading of Section 2510(5)(a)(i).

Scheib v. Grant, 22 F.3d 149 (7th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 320 (1994), presents a variation of the

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[8] The *Heggy* opinion does not reveal to what extent, if any, the defendant-husband relied on the extension telephone exemption recognized by Section 2510(5)(a)(i), nor does it discuss its possible applicability under the facts of that case. However, in view of the fact that the plaintiff-wife did not consent to the taping and was not informed of the recording, it seems apparent that the jury's rejection of the reason advanced by the defendant-husband for the taping was reasonable and also probably explains why the defendant's main focus was on the interspousal exemption recognized by *Simpson*.

civil litigation spawned by the provisions of Title III. A mother, Lynn Scheib, brought an action against the father's attorneys and her child's guardian ad litem seeking damages for violations of both Title III and Illinois eavesdropping statutes. The parents were involved in a custody and visitation dispute as the mother, who had custody, prepared to leave Illinois with the child. Her husband's emergency motion for injunctive relief had prevented the departure of the child. The father had temporary custody by way of visitation rights and used a telephone answering machine attached to an extension phone to record at least two phone conversations between the mother and child. The father's attorneys agreed with the father that the taped conversations showed that harm was being done to the child and the tapes were delivered to the guardian ad litem. After the mother's lawyers learned of the existence and content of the tapes, they successfully prevented the use of the tapes in the state proceedings and the removal of the child was agreed upon by the parties. Keeping her promise not to sue the father, the mother instead sued the father's lawyers and the guardian ad litem. The district court granted summary judgment to the defendants after determining that the phone extension exemption applied to the home as well as the marketplace. The circuit court affirmed, holding that the recording of the child's conversations fell within the ordinary course of business as it declared:

> We cannot attribute to Congress the intent to subject parents to criminal and civil penalties for recording their minor child's phone conversations out of concern for the child's well being.

Scheib v. Grant, 22 F.3d at 154. The plaintiff-mother had argued that the husband had a dual purpose in the recording in that he also desired to obtain negative information about his ex-wife. The circuit inferentially acknowledged that proof of such a purpose would be actionable, but that the plaintiffs had failed to come forward with any proof of such a motive.

This court concludes that the absence of an interspousal exemption from the restrictions of Title III as recognized by this circuit, together with the general proposition that spying on one's spouse does not constitute use of an extension phone in the ordinary course of business, defeats the government's reliance on the proposition that the telephone extension exemption of Section 2510(5)(a)(i) applies to Mrs. Murdock's pervasive recording of the intercepted telephone calls involving many persons other than her husband.

Consequently, we turn to the question of whether the statutory suppression provisions of Section 2515 apply in this case.

C. Application of 18 U.S.C. § 2515

Section 2515 of Title III provides that when "any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom" can be used in any proceeding "if the disclosure of that information would be in violation of [Title III]." Murdock takes the position that, if his ex-wife's tape recordings are found to violate Title III, then Section 2515 requires suppression. He points to the case of *United States v. Vest*, 639 F. Supp. 899 (D. Mass. 1986),

aff'd, 813 F.2d 477 (1st Cir. 1987), in support of this proposition.

The *Vest* court concluded that suppression of an illegally recorded transaction was required in the prosecution of defendant Vest for perjury. Vest was a Boston police detective who allegedly conspired with Detective Francis Tarantino and one Jesse James Waters (who had shot Tarantino) to use Tarantino's efforts, in return for $300,000 from Waters, to assure that Waters would not be sentenced to prison if he pled guilty to the various charges against him stemming from the shooting. Vest was to be the conduit for the payments to Tarantino. Without Vest's knowledge, Waters recorded the transaction and accompanying discussion. When Waters *was* sentenced to prison, he turned over the tape to investigating authorities. After Vest was granted immunity, he testified before a grand jury that he had not participated in Waters's payment to Tarantino. When confronted with Waters's tape, Vest denied that it was his voice. The grand jury indicted Vest for perjury.

The district and circuit courts found that the interception was unlawful in that it was made in violation of Section 2511(1)(a) and (2)(d). In affirming the district court's suppression of the unlawfully intercepted evidence, the Court of Appeals stated:

> In *Gelbard v. United States*, 408 U.S. 41, 47-52, 92 S. Ct. 2357, 2360-63, 33 L.Ed.2d 179 (1972), the Supreme Court exhaustively reviewed the legislative history of Title III and concluded that "the protection of privacy was an over-riding congressional concern" when it enacted Title III, *id.* at 48, 92 S.Ct. at 2361, and that section 2515's

> "importance as a protection for 'the victim of an unlawful invasion of privacy' could not be more clear." *Id.* at 50, 92 S.Ct. at 2362. As the Court recognized in *Gelbard, id.* at 51-52, 92 S.Ct. at 2362-63, . . . an invasion of privacy is not over when an interception occurs, but is compounded by disclosure in court or elsewhere. The impact of this second invasion is not lessened by the circumstance that the disclosing party (here, the government) is merely the innocent recipient of a communication illegally intercepted by the guilty interceptor (here, Waters).

United States v. Vest, 813 F.2d at 481. Thus, the First Circuit read *Gelbard* as standing for the proposition that any and all illegally intercepted evidence must be suppressed in order to protect the victim's privacy.

We do not read *Gelbard* as broadly as did the *Vest* court. *Gelbard* involved a witness's challenge to a finding of civil contempt for refusing to testify before the grand jury, invoking as a defense the ground that the interrogation was to be based on information allegedly intercepted by illegal wiretapping and electronic surveillance conducted by federal agents. The witness wanted an opportunity to challenge the legality of the interceptions before he would be required to testify. Instead he was found in contempt. The Supreme Court held that, in civil contempt proceedings, a witness can invoke Section 2515 as a defense since a finding that the interception was illegal would constitute the "just cause" that precludes civil contempt under 28 U.S.C. § 1826(a). In *Gelbard*, the witness was asserting that the government itself had engaged in illegal wiretapping and electronic surveillance. The *Gelbard* Court's discussion of the legislative

history of Section 2515, read in context of the facts of the case, emphasized not that individuals are just generally entitled to have their privacy protected, but that they are specifically entitled to protection from unscrupulous law enforcement procedures which invade their privacy. The point of *Gelbard* was that *if* the government was eventually shown to have illegally intercepted the conversations, then the witness was entitled under Title III to have that evidence suppressed and completely excluded from any line of questioning in any proceeding, including a grand jury proceeding. To cite *Gelbard* as standing for the proposition that the entire purpose of Title III is to prevent victimization in the form of invasion of privacy goes too far. As a result, we think that *Vest* was wrongly decided and we decline to follow it.

The district court in the instant case acknowledged the *Vest* holding and it, too, expressly declined to follow it. Instead, the district court relied on *United States v. Underhill*, 813 F.2d 105 (6th Cir.), *cert. denied*, 482 U.S. 906 (1987), to justify a "clean hands" exception to Section 2515.[9]

In *Underhill*, this circuit refused to apply Section 2515 to an unlawful interception because the defendants had been a party to the unlawful interception. Underhill and others had been engaged in a book-making operation. To

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[9] The district court did not actually need to reach this issue since it had already determined, wrongly in our view, that Mrs. Murdock's activities did not violate Title III. The court found it necessary to explain why "[e]ven if the tape recorded conversations fell under Title III's definition of an interception, the court would not suppress the recordings as evidence." (J.A. at A-67).

protect the integrity of the bets received, the bookies had recorded telephonically-placed bets. A search of the premises of the bookies had led to the discovery of the tapes which recorded the bets. As the interception was made for the purpose of committing a criminal act, it was deemed unlawfully intercepted. The bookies moved to suppress the tapes by invoking the provisions of Section 2515. The district court agreed and the government appealed. Judge Lively, writing for the unanimous panel, declared:

> It seems clear that neither the general purpose of Title III to protect the privacy of parties who use wire and oral communications nor the particular purpose of §2511(2)(d) to prevent misuse of the communications against a party to such communications would be served by suppressing the tapes in this case. In fact to do so would turn the statute on its head.
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> * * *
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> . . . Title III provides protection to the victims of unlawful interceptions, not to the perpetrators. . . . We think it is clear that Congress did not intend for § 2515 to shield the very people who committed the unlawful interceptions from the consequences of their wrongdoing. . . . If the language of §§ 2511(2)(d) and 2515 were applied literally to Underhill and Rokitka it would produce an absurd result that we are confident Congress did not intend.

United States v. Underhill, 813 F.2d at 111-112 (citations omitted). The district court in the instant case found that "suppression of the evidence in this case would similarly place Congress's intent on its head[.]" (J.A. at A-71).

While *Underhill* stands for the proposition that the suppression provisions of Section 2515 are not absolute, the instant case differs in a major respect from *Underhill* and most of the other case law which has built up around Section 2515, namely, in that the defendant was not the perpetrator but rather the victim of the interception and recording. The government, nonetheless, contends that the district court was correct in his recognition of a "clean hands" exception to Section 2515 since such recognition would not create the problem of government agents encouraging violations of Title III. We agree with the district court in his analysis.

The government also relies, correctly in our view, on the case of *United States v. Baranek*, 903 F.2d 1068 (6th Cir. 1990). In *Baranek*, police officers executing an authorized wiretap of a telephone overheard and recorded an extended non-telephonic conversation over the tapped line when the telephone receiver was inadvertently left off the hook. The court found it unnecessary to suppress the recorded conversation under Section 2515, explaining as follows:

> There is no doubt the government got a lucky break of sorts here and stumbled across the evidence involving [the defendant]. There is nothing in the fourth amendment or Title III, however, that demands that law enforcement and the public should lose the right to use this evidence. Although we concede that where Title III provides greater protection than the fourth amendment a defendant is entitled to the enhanced protection, we do not accept defendant's contention that fourth amendment law is

not involved in the resolution of Title III suppression issues. The Supreme Court has indicated to the contrary:

> Any lingering doubt is dispelled by the legislative history which, as we have recognized before in another context, declares that § 2515 was not intended "generally to press the scope of the suppression role beyond present search and seizure law." S.Rep. No. 1097, 90th Cong., 2d Sess., 96 (1968). *See Alderman v. United States,* 394 U.S. 165, 175-176 [89 S.Ct. 961, 967-68, 22 L.Ed.2d 176] (1969).

Scott v. United States, 436 U.S. 128, 139, 98 S.Ct. 1717, 1724, 56 L.Ed.2d 168, *reh'g denied,* 438 U.S. 908, 98 S.Ct. 3127, 57 L.Ed.2d 1150 (1978) (footnote omitted). Where, as here, we have a case with a factual situation clearly not contemplated by the statute, we find it helpful on the *suppression* issue (as opposed to the question of whether there was a violation of the authorization order) to look to fourth amendment law. We note in that regard that government agents are charged with no wrongdoing and that to suppress here would have no impact on the future conduct of law enforcement officials. In the usual fourth amendment calculus, these are factors that counsel against the necessity of suppression.

United States v. Baranek, 903 F.2d at 1072 (emphasis in original).

As in *Baranek,* the government here got "a lucky break." It was in no way involved in Mrs. Murdock's tape recording activities and the defendant makes no claim that Mrs. Murdock was an agent of the government.

Suppression of the evidence would have no deterrent effect. As the district court properly noted: "The intent of Congress would certainly have been followed had section 2515 served to deter *Mrs. Murdock*, but no deterrent effect is worked on the government in this case." (J.A. at 9, emphasis added).

Our independent reading of the legislative history of Title III leads us to the conclusion that while privacy was a major goal of the legislation, it was privacy in a particular context, namely, that an individual who is the *victim* of an unlawful interception is entitled to protection in court proceedings from any attempt by the *perpetrator* to use the interception against the victim or in any way to benefit from the information which was either contained in, or was the fruit of, the unlawful interception. The exception to this is the situation, like *Underhill*, where the person himself was the interceptor. There is nothing in the legislative history which requires that the government be precluded from using evidence that literally falls into its hands.

As suggested by *Baranek*, Fourth Amendment law is also instructive here. It is well established that evidence obtained by a private search is not subject to the Fourth Amendment exclusionary rule. In *United States v. Jacobsen*, 466 U.S. 109 (1984), the Supreme Court acknowledged that the Fourth Amendment protection against unreasonable searches and seizures "is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.' " *Id.* at 113 (quoting *Walter v. United*

States, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting) (footnote omitted).[10]

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[10] In *Jacobsen*, when a private freight carrier damaged a package with a forklift, employees of the carrier opened the package to examine its contents, pursuant to a written company policy relating to insurance claims. They discovered several sheets of crumpled newspaper covering a tube containing four zip-lock plastic bags "nested" one inside the other. The innermost zip-lock plastic bag held about six and one-half ounces of white powder. They immediately notified the Drug Enforcement Administration ("DEA"); however, before the DEA agent arrived, the carrier's employees replaced the plastic bags in the tube and returned the tube and the newspapers to the original container. When the agent arrived, he observed that the box top was open and that one end of the tube inside the box had been cut open. He removed the four plastic bags and observed the white powder. A field test immediately performed identified the substance as cocaine. On the strength of this information, the DEA obtained a warrant to search the place to which the package had been addressed. Arrests were made and, when the defendants were indicted for possessing an illegal substance with intent to distribute, they filed a motion to suppress on the ground that the warrant was the product of an illegal search and seizure. The motion was denied; defendants were tried, convicted and sentenced. They appealed. The Court of Appeals for the Eighth Circuit reversed, holding that the agents' field testing of the white powder constituted a significant expansion of the earlier private search and that a warrant was required prior to the field tests. The Supreme Court granted certiorari. The Court noted that "[t]he agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment." 466 U.S. at 119-120 (citations omitted). The Court further noted that "the removal of the plastic bags from the tube and the agent's visual inspection of their contents enabled the agent to learn nothing that had not previously been

The *Vest* court specifically rejected any application of a "judicially-fashioned" fourth amendment exclusionary rule to the "congressionally-created rule of Section 2515[.]" *United States v. Vest*, 813 F.2d at 481. The court "agree[d] with the district court that to hold that section 2515 allows the government's use of unlawfully intercepted communications where the government was not the procurer 'would eviscerate the statutory protection of privacy from intrusion by illegal private interception.' 639 F. Supp. at 914-15." The court quoted *United States v. Giordano*, 416 U.S. 505, 528 (1974) for the proposition that this type of protection of privacy "play[s] a central role in the statutory scheme[.]" This quotation from *Giordano* is taken out of context. *Giordano* can clearly be distinguished as a case in which the government itself had failed to comply with the terms of the statute and thereby wrongfully procured a wiretap from which evidence sought to be admitted had been obtained.[11]

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learned during the private search." *Id.* at 120. The Court thus concluded that since no legitimate expectation of privacy had been infringed, no "search" within the meaning of the Fourth Amendment had occurred. It further concluded that the agents' "seizure" of the package and its contents was not unreasonable under the circumstances. The Court also addressed the question of whether the field test of the powder, which exceeded the scope of the private search, constituted an unlawful "search" or "seizure" under the Fourth Amendment and concluded that, "[t]o the extent that a protected possessory interest was infringed, the infringement was *de minimis* and constitutionally reasonable." *Id.* at 126.

[11] *Giordano* involved a question of whether the government had sufficiently complied with the procedural requirements set forth in Title III for applying for a wiretap. The specific issue related to language in Section 2516(1) "conferring power on the

In this case, the government played no part in the unlawful interception. In fact, a number of years intervened before the defendant's conduct became manifest. Under the circumstances of this case, we find that any privacy interest which the defendant may have had is protected solely by his right to bring a civil action against his former wife. However, he does not enjoy the additional right to the suppression of the interceptions where, as here, the government took no part in the interceptions. In our view, it is appropriate under the legislative history and the case law to apply a "clean hands" exception to Section 2515.

IV. Conclusion

We REVERSE the district court's conclusion that the tape recorded conversations at issue here fall within the

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'Attorney General, or any Assistant Attorney General specially designated by the Attorney General' to 'authorize an application to a Federal judge . . . for . . . an order authorizing or approving the interception of wire or oral communications" by federal investigative agencies seeking evidence of certain designated offenses[.]" *United States v. Giordano*, 416 U.S. at 507-08, 94 S. Ct. at 1823. The Attorney General had delegated his Executive Assistant, who was not an "Assistant Attorney General," to authorize applications when the Attorney General was out of the office, as he was in the circumstances of the case. It was in this context that the *Giordano* Court made the "central role" statement quoted by the First Circuit. In fact, the actual statement made by the Supreme Court was that it was "confident that the provision for pre-application approval was intended to play a central role in the statutory scheme and that suppression must follow when it is shown that this statutory requirement has been ignored." *Id.* at 528.

telephone, or business, extension exemption of 18 U.S.C. § 2510(5)(a)(i).

We AFFIRM the district court's conclusion that the government is entitled to a "clean hands" exception to 18 U.S.C. § 2515.

Because our holding, although reversing the district court in part, reaches the same result as the [sic] did the district court, there is no need to remand. The defendant's conviction and sentence are AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
HAROLD MURDOCK,
Defendant.
_____/

CASE NO. 93-CR-80036-DT
JUDGE PAUL V. GADOLA

REPORT AND RECOMMENDATION

I. RECOMMENDATION:

The Court should deny the motion of defendant Murdock to dismiss the indictment and/or to suppress evidence.

II. REPORT:

A.

1. Defendant Harold D. Murdock ("Murdock") is charged in a one-count indictment with a violation of 26 U.S.C. § 7201, i.e., willfully attempting to evade and defeat the payment of income taxes due for the calendar year 1985.

On March 16, 1993, Murdock filed a motion to dismiss the indictment and/or to suppress evidence. He contends that the case against him "is based in significant part upon evidence acquired through unlawful electronic surveillance" and seeks an order suppressing any use by

the government of "a certain tape recorded conversation, and any and all evidence derived from that recording."

2. The government's response to the motion was filed on May 17, 1993. In the memorandum in support of the response, the government represents the following factual scenario:

> A brief description of the tape, the circumstances under which it was made, and the circumstances under which it came into the possession of the government is helpful. The tape is not a single conversation, but contains a series of telephone calls between defendant and other participants in the bribe activity. At the time in question, defendant operated a funeral parlor that was attached to his home, with telephone extensions in both the home and funeral parlor. The conversations in question were made with these telephones. The tape was made through the use of an answering machine that was attached to one of the telephone extensions, and the tape was made by a member of defendant's family, who had proper access to the subject business, home, telephones, and answering machine.
>
> The family member recognized that the recorded conversations concerned activity that was illegal and which victimized other bidders on the food supply contract which was the subject of the conversations. For this reason, the family member provided a copy of the conversations to Mr. McLemore with the accompanying note entitled 'Concerned Citizens.' As stated in the newspaper article, Mr. McLemore in turn, provided it to the newspaper. The Internal Revenue Service's criminal investigation uncovered

> the identity of the family member who taped the conversations and obtained the tape for the government's use in this case.

Defendant's reply adds the following:

> We believe a hearing would produce evidence that there were extension phones in three separate buildings: two in private residences and one at the Murdock Funeral Home; that the recordings were indiscriminate as opposed to those between family members; that Mr. Murdock at the time was estranged from his wife; and that the recordings *may not* have been made by a family member of Mr. Murdock's but rather by Mr. Murdock's estranged wife's son of another marriage.

The government has stipulated to the correctness of defense counsel's assertion that the conversations between Murdock and others were recorded by a third party, a family member, "without the consent of either of the parties to the conversation." Defense counsel admits that the government had no knowledge that the person intercepting the conversation was going to do so. Defense counsel asserts that the parties to these conversations were Steve Asmar, Ferd L. Hall and Murdock.

B.

Murdock's motion is based upon 18 U.S.C. § 2515, which provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial,

> hearing, or other proceeding in or before any court, grand jury, department officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

The government was not a party to the claimed illegality. Murdock's counsel relies on *United States v. Vest*, 813 F.2d 477 (1st Cir. 1987), for the proposition that there is no "silver platter" exception to the exclusionary rule of evidence written into § 2515 akin to that found in fourth amendment jurisprudence, e.g., *United States v. Jacobson*, 466 U.S. 109, 113-18 (1984).

C.

The government argues initially that the recordings made of Murdock's conversations were not interceptions forbidden by § 2515. Interception is defined in part in § 2510(4) as the acquisition of the contents of any communication through the use of any electronic, mechanical or other device. Section 2510(5) defines the term electronic, mechanical or other device as any device other than any telephone instrument furnished to the subscriber or user by a provider of electronic communications service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business. Because the extension telephone from which the recordings were made had been furnished to Murdock and his family for use in their business, argues government counsel, it was not a device within the meaning of § 2510(5).

The government relies on several civil cases for this contention. In *Anonymous v. Anonymous*, 558 F.2d 677 (2nd Cir. 1977), the Second Circuit concluded that a father had not violated § 2515 by taping calls between his daughter and his ex-wife through the mechanism of an answering machine. The Court analogized this as an alternative to listening in (presumably surreptitiously) via an extension phone. Likewise, in *Simpson v. Simpson*, 490 F.2d 803 (5th Cir. 1974), the Fifth Circuit concluded that family members did not violate § 2515 by listening in on telephone conversations involving other family members by picking up an extension phone. So also, in *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991), the Tenth Circuit held that a custodial parent had not violated § 2515 by recording telephone conversations involving her minor child without the child's knowledge and consent. These recordings were also made via an extension phone.

The government acknowledges that the Sixth Circuit has explicitly left open the question as to whether § 2515 reaches a family member's interception of a telephone conversation by use of an extension telephone in the family home. *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976). The government argues for the dual propositions "that the use of an authorized extension telephone to obtain conversations is not an interception within the meaning of Title III," and "that the *taping* of conversations that were lawfully obtained with an extension telephone is also not a violation of Title III."

D.

Defendant relies principally on *United States v. Jones, supra,* 542 F.2d 661 (6th Cir. 1976), and *United States v. Wuliger,* 981 F.2d 1497 (6th Cir. 1992). The Sixth Circuit in *Jones* clearly disagreed with the holding of the Fifth Circuit in the prior case of *Simpson v. Simpson,* 490 F.2d 803 (5th Cir. 1974), which had been relied upon by the district judge who dismissed the wiretapping charge. Jones was an estranged husband no longer living in the marital home who had surreptitiously placed a recording device on his estranged wife's phone while there to babysit.[1] By contrast, in the case at bar, the family member involved did not introduce or hook up any of the equipment used to record the conversations, but only activated equipment that had either been placed there by Murdock himself or with his apparent knowledge and consent. Thus, unlike the defendant in *Jones,* this family member could not be successfully prosecuted for a violation of Title III.

The decision in *United States v. Wuliger, supra,* does not discuss the crucial issue involved in the case at bar. Wuliger was a lawyer retained by a husband being sued for divorce. The husband gave Wuliger recordings of all telephone calls at their marital home for a one-week period, saying to Wuliger that he had recorded these telephone conversations, which included calls between the wife, her priest, her marriage counselor, her attorney and many of her friends, "with his wife's knowledge." 981 F.2d at 1500. It developed that the husband had in

---

[1] The government contended that Jones had intercepted the wife's telephone conversations outside the curtilage of the residence. 542 F.2d at 663.

fact secretly installed a wiretap device without the wife's prior knowledge or consent. The husband was given immunity in order to prosecute his lawyer. The Sixth Circuit reversed the conviction, saying a new trial was necessary because the jury had not been told it could not convict Wuliger unless it found that he knew or had reason to know that the recordings violated Title III. In *Wuliger*, as in *Jones*, the factual scenario thus involves the actual placement of equipment for the sole purpose of secretly recording conversations involving other persons, whereas in the case at bar the only action taken by the putative violator of Title III was to activate equipment (an answering machine) that was presumably known by Murdock to be already in place.

I conclude, based on the factual scenario summarized earlier in this report, that the family member involved in this case did not violate Title III by activating equipment already in place that Murdock knew or had reason to know was there, i.e., extension phones with attached recording devices for receiving phone messages. On this basis, the motion lacks merit and should be denied, unless the Court concludes that the taking of evidence to establish the facts asserted is warranted before an adjudication is made.

III. NOTICE TO PARTIES REGARDING OBJECTIONS:

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. section 636(b)(l) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections

constitutes a waiver of any further right of appeal. *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981), *Thomas v. Arn*, 474 U.S. 140 (1985), *Howard v. Secretary of HHS*, 932 F.2d 505 (6th Cir. 1991). Filing of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987), *Willis v. Secretary of HHS*, 931 F.2d 390, 401 (6th Cir. 1991). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

/s/ Paul J. Komives
PAUL J. KOMIVES
UNITED STATES
MAGISTRATE JUDGE

Dated June 17, 1993

PURSUANT TO THE ILLEGIBLE
COPIES HAVE BEEN MAILED TO THE FOLLOWING:
/s/ Neil Fink, Esq.
/s/ Gary Felder, A.U.S.A.

ON June 17, 1993

/s/ Illegible
DEPUTY COURT CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

HAROLD D. MURDOCK,

Defendant.

_____ /

CRIMINAL NO. 93-80036

HONORABLE PAUL V. GADOLA
U.S. DISTRICT JUDGE

ORDER ACCEPTING MAGISTRATE JUDGE KOMIVES' JUNE 17, 1993 REPORT AND RECOMMENDATION

The court, pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, 28 U.S.C. § 636(b)(1)(B), LR 72.1(d)(2) (E.D. Mich. Jan. 1, 1992), has reviewed the magistrate judge's June 17, 1993 report and recommendation as well as defendant's June 24, 1993 objections thereto and the government's July 9, 1993 response to those objections. After conducting a de novo review, the court accepts the magistrate judge's report and recommendations as the court's findings and conclusions.

NOW, THEREFORE, IT IS HEREBY ORDERED that the magistrate judge's June 17, 1993 report and recommendation is **ADOPTED.**

IT IS FURTHER ORDERED that defendant Murdock's motion to dismiss the indictment and/or to suppress evidence is **DENIED.**

/s/ Paul V. Gadola
PAUL V. GADOLA
UNITED STATES
DISTRICT JUDGE

DATED: 8/3/93

A TRUE COPY
BY /s/ Carolyn D. Orazio
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

HAROLD MURDOCK,

Defendant.

_____ /

CRIMINAL NO. 93-80036

HONORABLE PAUL V. GADOLA
U.S. DISTRICT JUDGE

MEMORANDUM OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR REHEARING

On August 4, 1993, the court adopted the magistrate judge's June 17, 1993 report and recommendation and denied defendant Harold Murdock's motion to dismiss the indictment and/or to suppress evidence. On August 9, 1993, defendant filed a motion for rehearing of the court's August 4, 1993 order. Pursuant to the motion for rehearing, both the government and defendant requested that an evidentiary hearing be held so that a full and complete record could be made of the factual circumstances surrounding the issues underlying defendant's original motion. On September 24, 1993, the court conducted an evidentiary hearing and heard argument from both sides on defendant's motion for rehearing. Because of the additional information garnered during the hearing and because of the importance of this motion, the court will engage in a more extensive analysis of the issues than would normally be necessary on a motion for

rehearing. For the reasons discussed below, the court will deny defendant's motion.

I. Facts

Defendant Harold Murdock is charged with tax evasion under 26 U.S.C. § 7201. He stands accused of accepting $90,000 in bribes without reporting the money as income on his tax return. Defendant allegedly took the bribes while he served as the President of the Detroit Board of Education in exchange for assistance on a milk contract between a private contractor and the Detroit Public Schools. The government's case depends, to a great extent, on a series of taped telephone conversations in which defendant discusses the bribes with another school official. Defendant is asking this court to suppress the tape recorded conversations pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. § 2515.

The tape recordings were made in 1985 by Georgia Murdock, defendant's ex-wife. At the time that the conversations took place, defendant and his wife operated a funeral parlor together that was located next door to Mrs. Murdock's home. The Murdocks had been separated since 1984, and Mr. Murdock no longer lived with his wife.

Mrs. Murdock had filed for divorce and she suspected that her husband was having an affair and that he was stealing money from their joint funeral parlor business. As a result, she decided to tape record her husband's phone conversations in order to assist her in the divorce proceedings. Twelve years earlier, Mrs. Murdock

had approached a private detective about investigating her husband's activities. He had told her that it was illegal for him to tape record her husband's telephone conversations, but that she could do so on her own.

Mrs. Murdock purchased a tape recorder and some telephone equipment at Radio Shack. The funeral parlor had two telephone lines. There were also two extensions for these lines next door in Mrs. Murdock's house so that calls to the funeral parlor could be answered at home. Following instructions set forth in a Radio Shack manual about phone installation, Mrs. Murdock attached a tape recorder to each of the two business extensions located in her home. One extension was located in her own bedroom, and the other extension was located in a neighboring bedroom. She also attached an on/off switch so that she could control when the tape recorders would operate.

Mrs. Murdock taped conversations for approximately three months in 1985. She recorded conversations that were conducted over the two business lines when she was out running errands and when she was at home. After approximately three months of taping, she accumulated about two shoe boxes full of tapes. Because Mrs. Murdock did not always monitor the recorders when she turned them on, some of the tapes contained conversations made by other employees of the funeral parlor. Mrs. Murdock also kept a log of all of the conversations so that she could keep track of them. She stopped taping when her son by another marriage told her that the taping was illegal. In 1992, Mrs. Murdock destroyed the tapes and the log.

In April of 1986, Mrs. Murdock read a newspaper article about a company that was losing the Detroit schools milk contract. Based on the conversations that she had tape recorded, Mrs. Murdock recognized that her husband was involved in the events described in the article. As a result, Mrs. Murdock then anonymously sent a tape to the company that lost out on the contract, Jo-Dan Limited Company, in order to tell them about her husband's activities. Jo-Dan forwarded the tape to local prosecutors and the Detroit Free Press.

The newspaper published a story about the alleged bribes based on the tape recordings on May 16, 1986. As a result of the story, federal agents began an investigation.

II. Interception Under Title III

Defendant seeks to suppress the tape recorded conversations and all evidence derived from them pursuant to 18 U.S.C. § 2515 of Title III. Section 2515 states that

> [w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial . . . if the disclosure of that information would be in violation of this chapter.

Id.

The government argues that Mrs. Murdock's tape recordings are not interceptions as defined by Title III. Interception is defined as the "acquisition of the contents of any . . . communication through the use of any electronic, mechanical or other device." *Id.* § 2510(4). Section

2510(5) defines the phrase "electronic, mechanical or other device." It states that the phrase means any device other than "any telephone . . . instrument . . . furnished to the subscriber or user by a provider of . . . electronic communications service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business." *Id.* § 2510(5)(a)(i).

The government claims that the extension telephones from which Mrs. Murdock recorded the conversations were not devices used to intercept conversations governed under the statute. Rather, the government contends that the taping of conversations over an extension does not constitute an illegal interception under Title III. In support of its position, the government relies on several civil cases that have allowed the taping of conversations from a telephone extension. *Newcomb v. Ingle,* 944 F.2d 1534, 1536 (10th Cir. 1991), *cert. denied,* 112 S. Ct. 903 (1992); *Briggs v. American Air Filter Co., Inc.,* 630 F.2d 414, 417 (5th Cir. 1980); *Anonymous v. Anonymous,* 558 F.2d 677, 679 (2d Cir. 1977); *Simpson v. Simpson,* 490 F.2d 803, 809 (5th Cir.), *cert. denied,* 419 U.S. 897 (1974). For example, in *Anonymous,* the court held that a father had not violated Title III when he taped calls between his daughter and his ex-wife using an answering machine. The court said that listening in on an extension phone would be lawful, and therefore, any tape recording of those conversations would also be lawful. *Anonymous,* 558 F.2d at 679.

Defendant claims that *United States v. Jones,* 542 F.2d 661 (6th Cir. 1976) is dispositive of the issue. In *Jones,* the Sixth Circuit found that there was not a spousal immunity exception to Title III. The court found that a defendant who had surreptitiously placed a wiretap in his ex-

wife's home was in violation of Title III. As the government correctly points out, however, the Sixth Circuit specifically did not rule on the extension phone doctrine. The court stated: "We express no opinion on the dictum in *Simpson v. Simpson*, 490 F.2d at 809 n.17 that Title III does not reach a family member's interception of a telephone in the family home." *Id.* at 673 n.24. The court further noted that "there is a vast difference between overhearing someone on an extension and installing an electronic listening device to monitor all incoming and outgoing telephone calls." *Id.* The facts in Jones, however, are clearly different. In this case, Mrs. Murdock installed a tape recorder in her own private bedroom to monitor calls made on two business extensions, not a bug in someone else's home. Because the factual scenario presented in *Jones* is so different and because the Sixth Circuit has not yet squarely addressed the issue, the court is free to decide the issue.

The court finds that an interception covered by Title III did not take place. The facts of this case present a very close question, but the court will uphold its previous decision on this issue. From her own bedroom, Mrs. Murdock was listening in and tape recording conversations that were occurring over an extension that had been installed by the telephone company. This extension is one of the devices excepted from Title III by section 2510(5)(a)(i). Most courts have found that there is no difference between listening in on an extension and recording conversations overheard on the extension for purposes of section 2510(5)(a)(i). *See Epps v. Saint Mary's*

Hosp. of Athens, Inc., 802 F.2d 412 (11th Cir. 1986) (interception device was not equipment used to record; interception device was extension phone); *Newcomb*, 944 F.2d at 1536 ("The difference between listening on the extension and tapping the line within the home in the context here is not material."); *Anonymous*, 558 F.2d at 679 (no distinction between listening in and recording over extension phone); *Simpson*, 490 F.2d at 803 (same); *see also United States v. Harpel*, 493 F.2d 346, 350 (10th Cir. 1974) ("recording device . . . cannot itself be the acquiring mechanism"). *But see Deal v. Spears*, 980 F.2d 1153 (8th Cir. 1992) (tape recorder was the device, not the extension phone). The court is persuaded that section 2510(5)(a)(i) was intended to cover tape recordings made over extension phones. Recording what one can legitimately and lawfully listen in on does not turn the act into an interception.

The next issue is whether the extension telephone lines were used by Mrs. Murdock in the ordinary course of business as required by section 2510(5)(a). If the extensions were not used in the ordinary course of business, then the tape recordings of the conversations over those extensions would constitute illegal interceptions under Title III. Mrs. Murdock's efforts at taping her husband's conversations were extensive and continuing. However, her purpose was to investigate his marital infidelities and his alleged theft of funds from their joint business. Conduct with such a purpose, although it should have been limited and circumscribed to a much greater extent, falls within the ordinary course of business. The "ordinary course of business" language was included in section 2510(5) so as to prevent "policemen and private

intruders" from entering homes and listening in on extension telephones. *Anonymous,* 558 F.2d at 679 (citing *Hearings on the Anti-Crime Program Before Subcomm. No. 5 of the House Judiciary Comm.,* 90th Cong., 1st Sess. 901 (1967)). *But see Harpel,* 493 F.2d at 351 (limiting scope of ordinary course of business). As the *Simpson* court stated, "it is clear that Congress did not intend to prohibit a person from intercepting a family member's telephone conversations by use of an extension phone in the family home." *Simpson,* 490 F.2d at 809 n.17. A situation where an intruder or government agent tapped an extension does not present itself here. As a result, because the tape recordings were not made pursuant to an interception as defined under section 2510(5), they will not be excluded from evidence under section 2515.

III. Exclusion Under Section 2515

Even if the tape recorded conversations fell under Title III's definition of an interception, the court would not suppress the recordings as evidence. The government was not a party to the tape recordings. It did not encourage, nor did it even have any knowledge of the taping. Government agents learned of the existence of the tapes by reading a newspaper story. No deterrent effect is served by punishing the government for the alleged wrongdoings of Mrs. Murdock. The exclusionary rule governing evidence obtained improperly under the Fourth Amendment is said to set the criminal free when the constable blunders. The court does not believe that through enactment of section 2515 of Title III, Congress

intended to set the criminal free when the ex-wife blunders.

The deterrent nature of section 2515 is supported by the legislative history. Section 2515 was intended to "impose[ ] an evidentiary sanction to compel compliance with the other prohibitions of the chapter." S. Rep. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. at 2185. The statute was intended to deny the "perpetrator . . . the fruits of his unlawful actions in civil and criminal proceedings." *Id.* at 2156. The intent of Congress would certainly have been followed had section 2515 served to deter Mrs. Murdock, but no deterrent effect is worked on the government in this case.

The courts have already recognized an exception to section 2515 in cases where the tape recordings are used for purposes of impeachment. *See, e.g., United States v. Winter,* 663 F.2d 1120, 1154 (1st Cir. 1981), *cert. denied,* 460 U.S. 1011 (1983); *United States v. Caron,* 474 F.2d 506 (5th Cir. 1973). This exception was partly based on the legislative history of section 2515 which states that Congress did not intend "to press the scope of [the] suppression role [of section 2515] beyond present search and seizure law." S. Rep. No. 1097, *supra,* at 96, *reprinted in* 1968 U.S.C.C.A.N. at 2185. The report goes on to cite *Walder v. United States,* 347 U.S. 62 (1954) as an example of the search and seizure jurisprudence that Congress did not intend to disrupt. *Id.* In *Walder,* the Court recognized an exception to the Fourth Amendment exclusionary rule when the illegally obtained evidence is used merely for the purpose of impeachment.

Under Fourth Amendment law, a similar exception has been carved out in cases where government agents receive evidence obtained by private parties. In *United States v. Jacobsen*, 466 U.S. 109, 113-18 (1984), the Supreme Court held that evidence falling into the government's hands after a private search and seizure should not be excluded. A similar exception applies in cases where evidence is obtained in violation of the Fourth Amendment by foreign government agents. *United States v. Peterson*, 812 F.2d 486, 490 (9th Cir. 1987) ("exclusionary rule analysis" does not apply to "searches by foreign authorities"); *United States v. Rose*, 570 F.2d 1358, 1361-62 (9th Cir. 1978); *Birdsell v. United States*, 346 F.2d 775, 782 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965).

The Supreme Court has interpreted the Fourth Amendment to protect the individual's legitimate expectation of privacy. Similarly, one of the overriding concerns in enacting Title III was the "protection of privacy." *Gelbard v. United States*, 408 U.S. 41, 48 (1972). One of the ways Congress hoped to protect privacy was through section 2515. Because evidence obtained in violation of Title III would be excluded, violators have no incentive to commit such wrongs. Furthermore, violators face civil or criminal penalties when they violate Title III. *See* 18 U.S.C. §§ 2511 & 2520. Thus, by recognizing an exception to section 2515 where the government is free of any involvement in the interception and where contravention of section 2515 is not intended, the mandate of Title III is still protected. Those in violation of Title III, including possibly Mrs. Murdock, would still face punishment even if the government were allowed to use the evidence at a criminal trial.

The one court of appeals that has addressed the issue has concluded that no clean hands exception applies to section 2515. In *United States v. Vest*, 813 F.2d 477 (1st Cir. 1987), the court excluded a tape recording made by a codefendant on a perjury charge. The court held that even though the government played no role in the taping, the evidence could not be used in the government's case in chief because Congress did not explicitly provide for such exceptions.[1]

The Sixth Circuit has also addressed a situation where the language of Title III was at odds with the intent of Congress. In *United States v. Underhill*, 813 F.2d 105 (6th Cir. 1987), the Sixth Circuit refused to suppress tapes of gambling transactions made by the bookies themselves in violation of Title III. In *Underhill*, even though the tapes could be excluded under a literal reading of the language at issue, the court found Congress would not have intended that criminals who voluntarily recorded their own wrongdoing should be protected by section 2515. The court noted that a "result contrary to the literal meaning of the words is justified when the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *Id.* at 111. Because the court finds that suppression of the evidence in this case would similarly place Congress's intent on its head, the court will not follow the decision of the First Circuit's interpretation of section 2515.

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[1] The court did note, however, that the citation of *Walder* in the legislative history did mean that an exception to section 2515 did exist if the evidence was used for purposes of impeachment. *Vest*, 813 F.2d at 482.

A clean hands exception to section 2515 will not create the problem of government agents encouraging violations of Title III. In the Fourth Amendment context, similar possibilities arise. If government agents encourage private parties or foreign governments to violate the Fourth Amendment in order to avoid the exclusionary rule, then the Fourth Amendment has been violated and the evidence will be excluded. The courts have carved out such exceptions to the Fourth Amendment with an awareness that abuse is possible. With either Title III or the Fourth Amendment, abuse will always be possible. The question is whether the fear of possible abuse should bar evidence or a crime that the government legitimately acquired. Congress intended that section 2515 should prevent the perpetrator of an interception from getting the fruits of his wrongdoing. Suppression of the evidence in this case would not serve this congressional purpose. Thus, even if the tape recordings were made pursuant to an interception as defined by section 2510, the court would still allow the evidence because the government had no involvement in the alleged interception.

ORDER

Therefore, it is hereby **ORDERED** that defendant's motion for rehearing is **DENIED.**

SO ORDERED.

Dated: 1/4/94

/s/ Paul V. Gadola
PAUL V. GADOLA
UNITED STATES
DISTRICT JUDGE

NO. 94-1984

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	ORDER
v.	)	(Filed Oct. 6, 1995)
HAROLD D. MURDOCK, Defendant-Appellant.	)	

BEFORE: JONES and NORRIS, Circuit Judges; and DOWD,* District Judge.

The court received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

* Hon. David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation

Supreme Court, U.S.
FILED
APR 10 1996
CLERK

No. 95-1109

In the Supreme Court of the United States

OCTOBER TERM, 1995

HAROLD D. MURDOCK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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I

QUESTION PRESENTED

Whether Title III of the Organized Crime Control Act of 1968 requires suppression, in a federal criminal prosecution, of the contents of a telephone conversation that a private party intercepted in violation of Title III without the knowledge or participation of the government.

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In the Supreme Court of the United States

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HAROLD D. MURDOCK, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-33) is reported at 63 F.3d 1391. The district court's order of August 3, 1993, denying the motion to dismiss the indictment and suppress evidence (Pet. App. 42-43) and its memorandum opinion and order of January 4, 1994, denying the motion for rehearing (Pet. App. 44-55) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1995. A petition for rehearing en banc was denied on October 6, 1995. Pet. App. 56. The petition for a writ of certiorari was filed on January 4, 1996.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional plea of guilty, petitioner was convicted in the United States District Court for the Eastern District of Michigan of attempted income tax evasion, in violation of 26 U.S.C. 7201. The district court sentenced petitioner to a term of imprisonment of one year and one day. The court of appeals affirmed. Pet. App. 1-33.

1. In 1985, petitioner and his wife were separated, but they continued jointly to operate a funeral home business. The couple's marital difficulties prompted petitioner's wife to record petitioner's telephone calls on the funeral home's telephone line. She did so by connecting a tape recorder to an extension telephone in her residence, which was located next to the funeral home. Petitioner's wife accumulated two shoe boxes of tapes containing her husband's telephone conversations. A story in the local newspaper led her to believe that one conversation that she had taped contained evidence that her husband, who was President of the Detroit, Michigan, school board, had accepted bribes from a contractor who supplied milk to the school system. Anonymously, she mailed a copy of that taped conversation to the losing bidder, which provided the conversations to the local prosecuting attorney and to a newspaper. The newspaper printed an article outlining the bribery scheme. That story led federal agents to initiate a criminal investigation of petitioner, which culminated in an indictment for income tax evasion, based on the fact that petitioner had not reported a $90,000 bribe as income on his tax return. Pet. App. 2-3.

The district court denied petitioner's motion to dismiss the indictment or to suppress the contents of the taped conversation under 18 U.S.C. 2515 of Title III of the Omnibus Crime Control and Safe Streets Act of 1962.* Pet. App. 42-43. While Section 2515 bars the evidentiary use of communications intercepted in violation of Title III, the court concluded that the taping of conversations over an extension phone does not constitute an illegal interception under 18 U.S.C. 2510(4) and (5). Pet. App. 41-49. As an alternative basis for its decision, the court held that suppression was not an appropriate remedy for the alleged violation under Section 2515, because government agents had not taken part in the interception, and because "[n]o deterrent effect is served by punishing the government for the alleged wrongdoings of [petitioner's wife]." Pet. App. 51.

2. The court of appeals affirmed. Pet. App. 1-33. It held, first, that petitioner's wife had violated Title III by taping petitioner's conversations. *Id.* at 6-22. The use of a recording device attached to an extension telephone to monitor petitioner's telephone calls constituted an "interception," the court stated, and did not fall within the "telephone extension exemption" provided by 18 U.S.C. 2510(4) and (5). Pet. App. 6-22.

The court of appeals held, however, that suppression was not an appropriate remedy for the violation in this case. The court explained that, while 18 U.S.C. 2515 provides for the exclusion from evidence of illegally intercepted communications, that remedy does not apply where the communication is offered into evidence by an entity, such as the government in

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* Title III was amended by the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848.

this case, that did not participate in the interception. Pet. App. 29. Moreover, the court noted, because the government was not involved in the illegal interception, suppression of the intercepted conversation would not deter violations of the statute. *Id.* at 28-29.

The court acknowledged that its holding that Section 2515 is subject to a "clean hands" exception conflicts with the First Circuit's holding in *United States* v. *Vest*, 813 F.2d 477 (1987), that suppression of all illegally intercepted communications is required under Section 2515, without regard to whether the proponent of the evidence was a party to the illegal interception, in order to vindicate the privacy rights of the victim of the interception. Pet. App. 22-32. The court of appeals stated that the First Circuit had erred in *Vest* in interpreting *Gelbard* v. *United States*, 408 U.S. 41, 47-52 (1972), to require the suppression of all illegally intercepted wire or oral communications. Pet. App. 23-24. The court of appeals noted that, because *Gelbard* involved a claim that the government had conducted an illegal wiretap and was attempting to use the fruits of that wiretap in a grand jury investigation, the decision in that case did not mandate suppression of evidence offered by parties who did not participate in the unlawful interception. *Id.* at 24-25.

ARGUMENT

Petitioner claims (Pet. 8-9) that review is warranted to resolve the conflict between the decision below and *United States* v. *Vest*, 813 F.2d 477 (1st Cir. 1987), with regard to the question whether 18 U.S.C. 2515 requires the suppression of an illegally intercepted communication that is offered by a party who did not participate in the interception. The court of

appeals correctly held that suppression is not required under those circumstances. While petitioner is correct that the decision below conflicts with the decision in *Vest*, review is not warranted, because the question presented has arisen so infrequently that its resolution would appear at this time to be of little importance to the administration of justice.

1. Section 2515 provides that:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding * * * if the disclosure of that information would be in violation of this chapter.

18 U.S.C. 2515. Read literally, Section 2515 would preclude the receipt in evidence of illegally obtained wiretap evidence for any purpose, including in a prosecution of a defendant under 18 U.S.C. 2511 for illegally intercepting communications, and in a civil action for damages under 18 U.S.C. 2520 arising from such an illegal interception. To avoid such results, this Court has instead held, based on the legislative history of Section 2515, that the suppression provision "was not intended 'generally to press the scope of the suppression role beyond present search and seizure law'" under the Fourth Amendment. See *Scott* v. *United States*, 436 U.S. 128, 139 (1978) (quoting S. Rep. No. 1097, 90th Cong., 2d Sess. 96 (1968)).

Under Fourth Amendment doctrine, it is well established that the exclusionary rule does not require suppression of evidence that falls into the government's hands following a private search and seizure.

United States v. *Jacobsen*, 466 U.S. 109, 113-118 (1984); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 488 (1971); *Burdeau* v. *McDowell*, 256 U.S. 465 (1921). That is because "[t]he exclusionary rules were fashioned 'to prevent, not to repair,' and their target is official misconduct." *Coolidge*, 403 U.S. at 488. In this case, the government played no part in the illegal interception by petitioner's wife of his telephone calls but instead learned of the substance of that interception after it had occurred. Accordingly, the exclusionary rule's goal of deterring unlawful conduct would not be advanced by barring the government from offering that evidence at trial.

In every case in which the application of Title III's exclusionary provision has been at issue, this Court has inquired whether the statute's legislative history supports that remedy. See *Scott*, 436 U.S. at 139; *United States* v. *Donovan*, 429 U.S. 413, 437-439 (1977); *United States* v. *Chavez*, 416 U.S. 562, 578 (1974); *United States* v. *Giordano*, 416 U.S. 505, 516-521 (1974); *Gelbard* v. *United States*, 408 U.S. 41 (1972). As the court of appeals recognized (Pet. App. 29), the legislative history of Title III supports the view that Section 2515 does not mandate the suppression of intercepted communications when offered by a party with "clean hands." As the Court has noted, the purpose of Title III is to protect privacy by regulating wiretapping and electronic surveillance. *Gelbard*, 408 U.S. at 47. The statute seeks to attain that objective by prohibiting certain types of wiretaps and electronic surveillance, by providing the victim of an unlawful interception a right to pursue money damages against the interceptor and by, in Section 2515, requiring the courts to exclude from evidence ille-

gally intercepted communications or the fruits of such communications.

The legislative history relating to Section 2515 makes clear that that provision was designed to deter violations of Title III. The Senate Report accompanying Title III (S. Rep. No. 1097, 90th Cong., 2d Sess. 96 (1968), explains that the overarching function of Section 2515 is to "compel compliance with the other prohibitions of the chapter." To achieve that goal, the Report states, "*[t]he perpetrator* must be denied the fruits of his unlawful actions in civil and criminal proceedings." S. Rep. No. 1097 at 69 (emphasis added) (quoted at *Gelbard*, 408 U.S. at 50). The Report adds that Section 2515 "largely reflects existing law," and that Congress did not intend "generally to press the scope of the suppression r[u]le beyond present search and seizure law. See *Walder* v. *United States*, 347 U.S. 62 (1954)." S. Rep. No. 1097, *supra*, at 96.

Depriving the government of the opportunity to offer the probative evidence of petitioner's guilt contained on the tape-recordings at issue in this case would not further Section 2515's deterrent purpose, because the government did nothing to bring about the illegal tape-recording. The "perpetrator" of the illegal recording was, instead, petitioner's wife, who recorded the calls on the business extension as a result of her suspicions of petitioner's marital infidelities. The government was not complicit in undertaking the interception; on the contrary, the government did not learn of the bribery scheme that was reflected on the tape-recordings from petitioner's wife, but from a newspaper article. Suppression in this case would therefore be contrary to this Court's teaching that Title III's suppression sanction should be limited to violations of those statutory require-

ments that "directly and substantially implement the congressional intent[]" in enacting the legislation. See *Donovan*, 429 U.S. at 433-434 (suppression not required where government failed to comply with identification requirements of 18 U.S.C. 2518(1)(b)(iv) and notice requirement of 18 U.S.C. 2518(8)(d)); *Chavez*, 416 U.S. at 577-578 (suppression not required when government misidentified authorizing official); *Giordano*, 416 U.S. at 527.

2. In *Vest*, the First Circuit reached the opposite result, holding that Congress's concern for the privacy interests of the victim of an illegal wiretap, which this Court noted in *Gelbard*, required the suppression of illegally intercepted communications whether or not the party offering such evidence had illegally procured it. 813 F.2d at 481. The First Circuit explained that "[t]he impact of this second invasion [of privacy] is not lessened by the circumstance that the disclosing party (here, the government) is merely the innocent recipient of a communication illegally intercepted by the guilty interceptor." *Ibid.*

In our view, the First Circuit erred in interpreting this Court's decision in *Gelbard* as making the privacy interests of the victim the sole determinant of the scope of the Section 2515 suppression remedy. At issue in *Gelbard* was a claim by a grand jury witness that the government had engaged in illegal wiretapping and electronic surveillance and that such surveillance would form the basis of his anticipated questioning before the grand jury. *Gelbard* held that if such evidence had been unlawfully intercepted by the government, it should be suppressed. In so holding, the Court noted, in part, that Section 2515 serves "as an evidentiary sanction to compel com-

pliance with the other provisions of" Title III, 408 U.S. at 50 n.9, quoting S. Rep. No. 1097, *supra*, at 96; and that suppression avoided entangling "the courts in the illegal acts of government agents." 408 U.S. at 51. The Court did not indicate that suppression would invariably be required where a violation of Title III had occurred, or where suppression would not serve the interest of deterring misconduct.

As the court of appeals in this case noted (Pet. App. 25) in explaining its disagreement with *Vest*,

> [t]he point of *Gelbard* was that *if* the government was eventually shown to have illegally intercepted the conversations, then the witness was entitled under Title III to have that evidence suppressed and completely excluded from any line of questioning in any proceeding, including a grand jury proceeding. To cite *Gelbard* as standing for the proposition that the entire purpose of Title III is to prevent victimization in the form of invasion of privacy goes too far.

Moreover, *Vest* is itself internally inconsistent. Despite its assertion that the victim's privacy interest dictates that the illegally intercepted communications be suppressed, the First Circuit held in *Vest* that such evidence could nonetheless be introduced under Section 2515 for the purpose of impeaching the victim's testimony. 813 F.2d at 484; see also *Forsyth* v. *Barr*, 19 F.3d 1527, 1541 (5th Cir.) (illegally intercepted information may be used for the purpose of impeachment), cert. denied, 115 S. Ct. 195 (1994); *United States* v. *Echavarria-Olarte*, 904 F.2d 1391, 1397 (9th Cir. 1990) (same). The First Circuit based that holding on the fact that the Senate Report cites *Walder* v. *United States*, 347 U.S. 62 (1954), see S.

Rep. No. 1097, *supra*, at 96, which held that under the Fourth Amendment, illegally obtained evidence may be offered to impeach a defendant's contrary testimony. In the sentence that immediately precedes the citation to *Walder*, however, the Senate Report states that Section 2515 was not intended "generally to press the scope of the suppression r[u]le beyond present search and seizure law." S. Rep. No. 1097, *supra*, at 96. The Senate Report's citation to *Walder* thus appears to have been illustrative, and not exclusive of the search and seizure principles that Title III intended to retain. Cf. *Scott*, 436 U.S. at 139. There is no reason why the settled Fourth Amendment principle that suppression is not required where evidence that had been illegally obtained by a private party falls into the government's hands should not also be applied in the Title III context.

In any event, while the decision below conflicts with the First Circuit's decision in *Vest* on the question whether Section 2515 requires the exclusion of illegally intercepted evidence when offered by an entity who was not party to the interception, we do not believe review of that question is warranted. That question arises very infrequently. We are not aware of any reported case that has addressed the question between 1987, when *Vest* was decided, and the date of the decision in the present case. There is therefore no need for that issue to be addressed at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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